



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 078 696 572



HARVARD LAW LIBRARY









Aug 1

1  
0

**REPORTS**  
**OF**  
**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF ALABAMA,**  
**EMBRACING**  
**THE DECISIONS MADE IN THE YEAR 1829,**  
**THOSE MADE AT THE JANUARY TERM OF THE YEAR 1830,**  
**AT LAW AND IN EQUITY.**

---

**BY GEORGE N. STEWART,**  
**REPORTER, APPOINTED BY THE COURT PURSUANT TO STATUTE.**

---

**VOLUME II.**

---

**TUSCALOOSA:**  
**PUBLISHED BY THE AUTHOR.**

**E. WALKER, PRINTER.**

.....  
**1832.**

SOUTHERN DISTRICT OF ALABAMA, ss.

BE IT REMEMBERED, that on this fourteenth day of September, in the year of our Lord one thousand eight hundred and thirty-two, and in the fifty-sixth year of the independence of the United States of America, George N. Stewart, Esquire, of said District, has deposited in this office the title of a book, the right whereof he claims as author and publisher, in the words following, to wit :

"Reports of Cases argued and determined in the Supreme Court of Alabama, embracing the Decisions made in the year 1829 and those made at the January Term of the year 1830, at Law and in Equity. By George N. Stewart, Reporter, appointed by the Court pursuant to Statute."

In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of copies, during the time therein mentioned:" and also, an act entitled "An act supplementary to an act entitled an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned; and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

[L. S.] In testimony whereof, at office, in the city of Mobile, I have hereunto set my hand and affixed the seal of the said Court, the day and date above written.

DAVID FILES,

*Clerk of the Southern District of Alabama.*

*Rec. Dec. 14, 1832*

one  
the  
his  
fol-

the  
aw  
e."

rn.  
and  
me'  
ries  
em  
ing

and

## INTRODUCTORY NOTICE.



The author is again compelled to tender his apology to the public, for the same reasons mentioned in the first volume, for the imperfections which will be found in this. The same difficulties existing, the cases herein contained are reported without the benefit of notes taken at the trial, and as far as the arguments of counsel and the authorities cited are concerned, the author has been compelled to draw upon various uncertain sources for information; so it is only in a few cases, comparatively speaking, that he has been enabled to give them, and then only in a limited manner. There may be found also some errors in the names of the counsel in several causes, for the same reason. At the end of the last term named in this volume, the author was appointed Reporter by the Court, since which time, full notes of the arguments and authorities in all cases have regularly and with much labor been taken and preserved, so that the difficulty is now overcome, and the deficiency will no longer exist in cases that may be reported after that term.

By this volume it will be seen that the decisions of our courts are daily growing in importance and interest; and with the rapid increase of population and wealth, added to the measures taken of late, and the disposition manifested further to improve the judiciary system in our State, no doubt can exist, but that in a short time, the judiciary of Alabama will be found to be equally respectable with that of her sister States.

GEORGE N. STEWART.

TUSCALOOSA, September 1, 1839.

# A TABLE OF THE CASES REPORTED IN THIS VOLUME.

The letter "v," follows the name of the plaintiff in error or appellant, and the word "and" the name of the defendant or appellee.

Adams and the State	231	Garrard & Morgan and M'Gowen	479
Adams & Elliott and M'Grew	502	Garrard v. Zachariah	410
Allen v. Booker	21	Garrow v. Hallett	449
Anonymous	228	Gates v. M'Daniel & Spurlin	211
Atwood and Johnson et al.	225	Gee, adm'r v. Nicholson	512
Atwood et al. and Lucas et al.	378	Gordon and Reid	469
Austill and Fryer	119	Governor and Lake & Barron	395
Avent v. Read	488	Grant & Conner v. Pettybone	445
Ayres v. Moore	336	Grayson and Clifton	412
		Green et al. and King	133
Baldwin v. Brogden	9		
Bandy and Boggs	459	Hallett v. Eslava et al.	115
Bank of Darien and Lucas	280	Hallett and Garrow	449
Bank of Georgia and Lucas	147	Harper and Perkins	477
Bates' adm'rs and Sewall	462	Harrison v. Davis	350
Bell et al. v. Payne & Williams	414	Hayden & Meriam and Pickens	10
Bibb and Hobbs	54	Hearne and Smith	169
Bibb and Ellis	63	Hefflin v. M'Minn	492
Bigger, adm'rs v. Hutchings & Smith, adm'rs	445	Henry and Roberts & Battle	42
Boggs v. Bandy	459	Hickman and Lucas	111
Booker and Allen	21	Hobbs v. Bibb	54
Boyd and Spann	480	Holder v. Meggison & Hill	175
Brahan & Atwood and Weakley	500	Howard v. Jackson	493
Brannan et al. v. Oliver	47	Howe's adm'rs and Johnson	27
Brandon et al. and Pope	401	Hudson and Musgrove	454
Brandon v. Snows & Cunningham	265	Hunt and Smith	232
Brogden and Baldwin	9	Hunt & Condry v. Mayfield	124
Burgess & Davis and Sugg	509	Hutchings & Smith, adm'rs, and Bigger adm'rs	445
Callier and Carrington	175		
Carrington v. Callier	175	Innerarity v. Kennedy & Kitchens	186
Carter & Carroll and Dunham	496		
Cato v. Easley	214	Jackson and Howard	493
Cawood et al. and the State	360	Johnson v. Howe's adm'rs	27
Chapman et al. and Collier	163	Johnson and Roberts	13
Chapman, judge of the city court, and Moore et al.	466	Johnson et al. v. Atwood	225
Childress and M'Gehee	506	Johnson v. Kelly & Hutchison	490
Clifton v. Grayson	412	Jordan v. Lewis	426
Cobb v. Reed	444	Judge and Oliver	483
Collier v. The State	388		
Collier v. Chapman et al.	163	Keath v. Patton	38
Copeland and Lucas	151	Kelly & Hutchison and Wade	443
		Kelly & Hutchison and Johnson	490
Davenport and Drish	266	Kennedy & Kitchens and Innerarity	156
Davis et al. and Smith	224	King v. Green et al.	133
Davis and Harrison	350	King v. Dougherty	487
Davis v. Dickson et al.	370		
Derreck and Echols	144	Lake & Barron v. The Governor	395
Dickson et al. and Davis	370	Leatt v. Strang	230
Dougherty and King	487	Leatt and Roehon	429
Drish v. Davenport	265	Leatt v. Stewart	474
Dudley & wife and Moore, ex'tor.	170	Lewis and Williams et al.	41
Dunham v. Carter & Carroll	496	Lewis and Jordan	426
		Lucas v. Hickman	111
Easley and Cato	214	Lucas v. Copeland	151
Echols v. Derreck	144	Lucas v. The Bank of Georgia	147
Ellis v. Bibb	63	Lucas and Sayre	259
Eslava et al. and Hallett	115	Lucas v. The Bank of Darien	280
		Lucas et al. v. Atwood et al.	378
Farrar v. Foote	442		
Foote and Farrar	442	M'Broom v. Sommerville et al.	515
Foster v. Foster	356	M'Daniel & Spurlin and Gates	211
Fryer v. Austill	119	M'Gehee v. Childress	506
		M'Gowen & wife v. Young	276

M'Gowen v. Garrard and Morgan	-	479	Rushing and Taylor	.	160
M'Grew v. Adams & Elliot	-	502	Russell & Moore and Teague	.	420
M'Kean & M'Kean and Plummer	-	423	Rutledge v. Rutledge	.	400
M'Kinney's ex'rs v. M'Kinney's adm'rs	-	17			
M'Minn and Hefflin	-	492	Sadler et al. and Robinson's heirs, &c.	.	520
M'Whorter v. Sayre & Sayre	-	225	Saffold et al. and Thompson	.	494
Martin v. White, adm'r	-	162	Sayre & Sayre and M'Whorter	.	325
Martin v. Townsend	-	329	Sayre v. Lucas	.	259
Maury v. Olive	-	472	Sewall v. Bates' adm'rs	.	462
Mayfield and Hunt & Condry	-	124	Smith v. Hearne	.	169
Meggison & Hill and Holder	-	175	Smith v. Hunt	.	223
Miller v. Pennington	-	399	Smith v. Davis et al.	.	224
Miller and Thompson	-	470	Snows & Cunningham and Brandon	.	255
Minter and Wright	-	453	Sommerville et al. and M'Broom	.	515
Moore et al. v. Chapman, judge of the c. court	-	466	Spann v. Boyd	.	480
Moore, ex'r v. Dudley & wife	-	170	State v. Plunket	.	11
Moore and Ayres	-	336	State v. The Tombeckbee Bank	.	30
Moseley and Winston	-	137	State v. Adams	.	231
Munn v. Pope	-	498	State v. Cawood et al.	.	360
Murphy and Wallis	-	15	State and Collier	.	388
Musgrave v. Hudson	-	464	Stebbins v. Sutton	.	249
			Stewart and Lecatt	.	474
Nicholson and Gee, adm'r	-	512	Strang and Lecatt	.	230
			Suttons and Stebbins	.	249
Oliver and Brannan et al.	-	47	Sugg v. Burgess & Davis	.	509
Oliver v. Judge	-	483	Sykes et al. v. Sykes et al.	.	364
Olive and Maury	-	472			
			Tankersly v. Richardson	.	130
Patton and Keath	-	38	Taylor v. Rushing	.	160
Payne & Williams and Bell et al	-	414	Teague v. Russell & Moore	.	420
Pennington and Miller	-	399	Thompson v. Miller	.	470
Perkins v. Harper	-	477	Thompson v. Saffold et al.	.	494
Pettybone and Grant and Conner	-	445	Tombeckbee Bank and The State	.	30
Pickens v. Hayden & Meriam	-	10	Townsend and Martin	.	329
Plummer v. M'Kean & M'Kean	-	423			
Plunket and The State	-	11	Wade v. Kelly & Hutchison	.	443
Pope v. Brandon et al.	-	401	Wallis v. Murphy	.	15
Pope and Munn	-	498	Watkins v. Watkins, use of Perkins	.	485
			Weakley v. Brahan & Atwood	.	500
Rapelye & Smith, survivors, &c. and Robinson	86		White adm'r and Martin	.	162
Read and Arent	-	488	White & Lesley adm'rs and Wiley & Gayle	.	331
Reed and Cobb	-	444	Wiley & Gayle v. White and Lesley, adm'rs	.	331
Reid v. Gordon	-	469	Williams et al. v. Lewis	.	41
Richardson and Tankersly	-	130	Winston v. Moseley	.	157
Roberts v. Johnson	-	13	Wright v. Minter	.	453
Roberts & Battle v. Henry	-	42			
Robinson v. Rapelye & Smith, survivors, &c.	86		Young and M'Gowen & Wife	.	276
Robinson's heirs, &c. v. Sadler et al.	-	520			
Rochon v. Lecatt	-	429	Zachariah and Garrard	.	410

## **JUDGES OF THE SUPREME COURT,**

**DURING THE PERIOD OF THE DECISIONS CONTAINED IN THIS VOLUME.**

**The Hon. ABNER S. LIPSCOMB, *Chief Justice and Judge of the First Circuit.***

**The Hon. REUBEN SAFFOLD, *Judge of the Second Circuit.***

**The Hon. HENRY W. COLLIER, *Judge of the Third Circuit.***

**The Hon. JOHN WHITE, *Judge of the Fourth Circuit.***

**The Hon. JOHN M. TAYLOR, *Judge of the Fifth Circuit.***

**The Hon. ANDERSON CRENSHAW, *Judge of the Sixth Circuit.***

**The Hon. SION L. PERRY, *Judge of the Seventh Circuit.***

**CONSTANTINE PERKINS, *Attorney General.***





**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF ALABAMA.**

---

CASES DETERMINED AT THE TERM OF THE FIRST MON-  
DAY IN JANUARY, 1829, AT TUSCALOOSA.

PRESENT AT THIS TERM,

THE HON. ABNER S. LIPSCOMB, CHIEF JUSTICE; AND THE HON.  
JOHN M. TAYLOR, SION L. PERRY AND HENRY W.  
COLLIER, JUDGES.

---

**BALDWIN V. BROGDEN.**

Where a defendant pleads as a set off, a note made by the plaintiff to another person, and transferred to him, the plaintiff will not be permitted to prove such set off void, as being given for a gambling consideration, without replying such defence specially.

IN the Circuit Court of Pike county, I. M. Brogden brought an action of assumpsit against B. Baldwin, on a promissory note made by him, for \$109 payable to one D. W. Edgerly or bearer, which by delivery had been transferred to Brogden. The defendant among other pleas pleaded as a set off, that he held a note for a larger sum made by the plaintiff to one Baker, or bearer, which had been duly transferred to him by delivery before the suit was brought, &c. No replication was filed to this plea, and in fact no issue was formally joined. At November term, 1827, a trial by jury was had. The defendant proved his possession of the note pleaded by him as a set off, and that it

JANUARY 1829.

Baldwin  
v.  
Brogden.

---

had been transferred to him before the suit was brought. The plaintiff offered evidence to prove that the note pleaded as a set off, was given for a gaming consideration contrary to the statute; to this evidence the defendant objected, but the Court overruled the objection and admitted the testimony, and the jury found for the plaintiff the amount of the note sued on and interest.

The admission of this testimony was the error assigned.

GOLDTHWAITE, for the plaintiff in error.

THORINGTON, for the defendant.

By THE CHIEF JUSTICE. The plaintiff below should have replied to the plea of set off, that the note was given for a gambling consideration. This would have given sufficient notice to the defendant, and he could have been prepared to meet the objection, but it was surely improper to receive the testimony without such a replication.

Judgment reversed and cause remanded

Judge CRENSHAW not sitting.

---

#### PICKENS v. HAYDEN and MERIAM.

In assumpsit, a judgment by default for costs only, and no damages, is erroneous.

THIS was an action of assumpsit determined in Monroe Circuit Court. It was brought by the appellees against the appellant, on a note of hand. At October term, 1822, the following entry was made: "Judgment by default; whereupon it is considered by the Court that the plaintiffs do recover of the defendant the sum of \$—— damages, and costs of suit, &c."

It was among other things assigned for error, that no damages being recovered, the judgment for costs alone was erroneous.

PARSONS and COOPER, for the plaintiff in error.

ELLIS, for the defendants.

By JUDGE COLLIER. In this case there was a judgment by default for costs of suit only. At common law, there were no costs; if the plaintiff was unsuccessful, he was amerced; if he prevailed, the defendant was in mercy. Neither party was burthened with the *expensa litis*.<sup>a</sup> The decision of this question depends upon the construction of our statute giving costs *eo nomine*, which is in these words — "That in all other cases in civil actions, the party in whose favor judgment shall be given, or in case of non suit, dismissal or discontinuance, the defendant, shall be entitled to full costs, except when it is or may be otherwise directed by law."<sup>b</sup> Costs are the consequence of a judgment, and do not constitute a judgment in themselves. The right of the successful party to costs does not depend on the rendition of a judgment for them, but is given by statute. Therefore if they are omitted, the judgment is not defective, nor the successful party deprived of them; he has only to adopt another remedy for their recovery. Hence, as costs are not a primary or essential constituent of a judgment, but merely a consequence of it, therefore a judgment, unless it be by confession, as it effects no other purpose than merely to authorize a collection of costs by execution, is erroneous. The practice of executing writs of inquiry on judgments by default where the amount is unascertained, if there were a doubt, might be considered as an evidence that this is a correct exposition of the statute.

Judgment reversed.

The CHIEF JUSTICE not sitting.

JANUARY 1889.

Pickens  
v.  
Hayden and  
Meriam.

a 2 Bac. Abr.  
title costs, A.

b Laws of Ala  
453.

### THE STATE V. PLUNKET.

Where in a statute, a general word is used, and afterwards more special terms, defining an offence, an indictment charging the offence must use the most special terms; and if the general word is used, though it would embrace the special term, it is bad.

PETER PLUNKET was indicted in the Circuit Court of Autauga county under the statute for horse stealing. The indictment charged him with stealing a horse. On the trial, the proof was that the animal stolen was a gelding, and the prisoner was convicted and sentenced. But the presi-

JANUARY 1889.

The State  
v.  
Pluncket.

ding Judge, under the statute authorizing novel and difficult questions to be referred to this court, reserved the question whether the defendant could be lawfully convicted.

GORDON, argued for the prisoner, and cited the following authorities to shew that the judgment was erroneous, and that the proof was insufficient to sustain the verdict. Laws of Alabama, page 208, sec. 19, page 915; Starkie's Criminal Pleader, 214, 249; Foster's Crown Law, 424; Cro. Jac. 607; 4 Bl. Comm. 240, note 14; 2 Hale, 182-3; 2 Hawkins, 479, sec. 34; ib. 486; ib. 615, 616, sec. 183; 3 Chitty's Criminal Law, 737, 983; 2 East, 676; 1 Leach, 105; East's Crown Law, 617.

PERKINS, Attorney General, for the State.

By JUDGE COLLIER. The question reserved for the consideration of this Court is, "can a defendant, on an indictment for stealing a horse, and it is proved to be a gelding, be convicted?"

The statute which directs the punishment for such an offence is in these words, "That if any person do feloniously take or steal any horse, mare or gelding, foal or filly, ass or mule; the person so offending shall, &c."<sup>a</sup> When a generic term employed in a statute is succeeded by one more definite in its meaning, it is necessary in an indictment predicated upon such statute, that the latter term should be used. Let this principle be applied: the word gelding being used after a term more general in its import, and the proof shewing a gelding to have been the subject matter of the theft, it results from this discrepancy between the allegation and the proof, that the defendant cannot be punished for the offence charged. Again, when a statute describes more objects of larceny than one, the legislature are to be understood as mentioning them in contradistinction to each other, and an indictment must be framed according to the particular facts, even though one of the descriptive terms may be sufficiently comprehensive to include all. Hence it follows, that before a defendant receives the statutory punishment, he must be found guilty on an indictment charging the particular offence which he has committed.<sup>b</sup>

If the descriptive term "horse" alone, had been used, evidence that a gelding was stolen would have been admissible; but as the legislature have thought proper to par-

<sup>a</sup>Laws of Ala.  
208.

<sup>b</sup>Stark. Crim.  
Plead. 214.  
249, 2 Hale,  
182-3.  
2 Hawk. 480,  
486, 615, 616,  
3 Chit. Crim.  
Law 737.  
2 East. 576.



ticularize and define other objects, the conclusion is obvious, from the reasoning employed, that in an indictment upon the statute it is necessary to be equally specific.

With this view of the question, the Court are unanimous in the opinion that the judgment below should be reversed.

JANUARY 1829.  
 Roberts  
 v.  
 Johnson.

Judgment reversed.

### ROBERTS V. JOHNSON.

1. On a writ against two defendants, the sheriff returns "*Executed; copy offered to defendant R. and not accepted.*"—*Semble*, that it is to be considered as executed on R. only.
2. But if executed on both, and the plaintiff discontinues as to one, and takes judgment against the other alone, no advantage can be taken on error by the defendant against whom the judgment is taken, unless he make the objection in the Court below.

GEORGE S. JOHNSON sued out a writ in debt returnable to the Circuit Court of Madison county, against Robert W. Roberts and John C. Gibbons, to recover on a note made by them for \$933. On this writ the sheriff made the following return "*Executed—copy offered to defendant Roberts, and not accepted, 25th April, 1827.*"

The plaintiff at the return term, filed his declaration against Roberts only, reciting that the said Gibbons was not found, and discontinuing his suit as to him. At the trial, a judgment by default was taken by the plaintiff against Roberts; and at the same term, on the affidavit of Roberts, the judgment by default was set aside, and the cause was continued. At May term, a judgment by default was again taken against Roberts, who still failed to plead. To reverse this judgment, Roberts sued his writ of error.

HUTCHISON and CRAIGHEAD, for the appellant, argued that the judgment being against Roberts alone, was erroneous, inasmuch as the record shews that the process was executed on both. Both defendants should have been declared against, and treated as being in Court. That the discontinuance was authorized by the statute only in cases where one was returned not found; and that therefore, as there was no such return here as to Gibbon, it was error to discontinue as to him.

ACKLEN, for the defendant.

JANUARY 1829.

Roberts  
v.  
Johnson.

---

By CHIEF JUSTICE LIPSCOMB. There is some ambiguity in the sheriff's return; a fair construction of it perhaps would be, that it was served on Roberts only, and if so, it was competent for the plaintiff to discontinue as to the other. But if the service had been perfected on both, the declaration being against one only, it should have been taken advantage of in the Court below by plea. The defendant suffered judgment by default, and opened the default on affidavit of merits, and then again permitted the judgment by default to be entered for want of a plea. The judgment must be affirmed.

Judgment affirmed.

## REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF ALABAMA.

---

CASES DETERMINED AT THE TERM OF THE FIRST MON-  
DAY IN JULY, 1829, AT TUSCALOOSA.

PRESENT AT THIS TERM,

THE HON. ABNER S. LIPSCOMB, CHIEF JUSTICE; AND THE HON.  
REUBEN SAFFOLD, ANDERSON CRENSHAW, JOHN M.  
TAYLOR, JOHN WHITE, SION L. PERRY,  
AND HENRY W. COLLIER, JUDGES.

---

### WALLIS V. MURPHY.

An affidavit that a party is *about to remove* himself out of the county of his residence so that the ordinary process of law cannot be served on him, is not sufficient to authorize an attachment to issue.

THOMAS B. MURPHY, by his agent D. Harding, sued out an original attachment in Morgan county against Ezekiel P. Wallis, to recover on a note of hand for \$107 75. The process was issued by a Justice of the Peace, and was made returnable to the County Court. The ground stated in the plaintiff's affidavit, for the issuance of the attachment is set forth in these words: "that said Wallis is about to remove himself out of the county of Morgan, his place of residence, so that the ordinary process of law cannot be served upon him, &c." The writ of attachment recited the ground of the issuance of the attachment thus: "oath having been made that said Ezekiel P. Wallis is about to remove himself out of your county privately, so that the ordinary process of law cannot be served upon him, &c."



JULY 1829.

Wallis  
v.  
Murphy.

The defendant appeared by his counsel, and at the trial term, moved the Court to quash the proceedings; which motion was overruled, and a verdict and judgment were rendered for the plaintiff for the amount of his debt.

*Wallis*, in this Court assigned several matters of error, and among other things that the writ of attachment improperly issued on a state of fact not sufficient to warrant it.

THORNTON, for the appellant; argued, that the recital in the writ that *Wallis was about to remove* privately was insufficient, and did not disclose such a state of fact as would authorize the issuance of it; that by the statute it was requisite that it should appear that the defendant was actually removing; the words of the statute are, "*is removing &c.*"<sup>a</sup> which is materially different. Again, the recital in the writ is not supported by the affidavit, for in the affidavit it does not appear he was about to remove *privately*. This is also a material requirement of the statute. The attachment therefore issued improperly, and consequently the judgment is erroneous.

M'CLUNG and ADAIR, for the appellee. It will be seen that the attachment was issued by the justice of the peace, under the 15th section of the act of 1814, to revise, *consolidate* and amend the several acts relative to justices of the peace, &c.<sup>b</sup> which requires as a condition that the plaintiff should comply with the terms and requisitions of the 5th section of that act.<sup>c</sup> One of the grounds for issuing an attachment by that section is, that the defendant *is about to remove himself* or effects out of the Territory, so that the ordinary process of law could not be served on him. By the second section of the act of 1807,<sup>d</sup> the language is "hath removed, or is removing him or herself out of the county privately." The 10th section of the same act, page 14, to prevent errors, as it is alleged, gives the form of the attachment and bond, and in that form, the words "*is about to remove himself out of your county,*" are used. The attachment in this case is a correct copy from that form. At the conclusion of the section, there is a proviso, that no attachment shall be abated for want of form, if the essential matters expressed in the foregoing precedent be set forth in such attachment. As in this case the attachment is substantially and probably literally copied from the form, it comes within the range and protection of this proviso. The Legislature in those acts of 1807 and 1814, intended to give a remedy where the ordinary process of the law would be in-

<sup>a</sup>Laws of Ala.  
p. 12 sec. 2.  
1 Marsh. 354.  
2 Hen. and  
Munf. 312.

<sup>b</sup>Laws of Ala.  
page 18.

<sup>c</sup>Laws of Ala.  
page 12.

<sup>d</sup>Laws of Ala.  
page 12.

effectual, or could not be served; the affidavit, together with the other requisites, states that the defendant was about to remove himself out of the county, his place of residence, so that the ordinary process of the law could not be served on him, and therefore it was substantially sufficient.

JULY 1890.

Wallis  
v.  
Murphy.

By JUDGE PERRY. Among other causes it is assigned for error, that the affidavit is not sufficient to authorize the issuance of the attachment. The question arises, is the statement in the affidavit sufficient under the act of 1907,<sup>a</sup> to authorize the issuance of the attachment? The causes for which an attachment may issue, as designated in the law, are, "that any person hath removed, or is removing him or herself out of the county privately," &c. The reasons then, as stated in the affidavit as the ground upon which the attachment issued, are not warranted by the statute, which only authorizes an attachment to issue upon affidavit that the person *hath* removed, or *is removing* him or herself out of the county *privately*, so that the ordinary process of law cannot be served on him. In this case the oath is, that the defendant below "is about to remove himself out of the county of Morgan, his place of residence, so that the ordinary process of law cannot be served upon him;" this statement does not furnish a sufficient reason for granting the attachment; it should have been, that Wallis was actually removed, or was removing privately, either of which facts might have furnished a sufficient reason for the issuing of the writ. The allegation, therefore, that Wallis was about to remove, does not negative the idea that he was not amenable to the ordinary process of law; consequently the attachment improperly issued, and should have been quashed.

<sup>a</sup> Laws of Ala.  
page 12, sec. 2

Judgment reversed.<sup>b</sup>

<sup>b</sup> See Wilson  
v. Oliver.  
Minor's Ad.  
Rep. 196.

### M'KINNEY'S Executors v. M'KINNEY'S Administrators.

In an action by executors, the plaintiff offered the deposition of a witness, who was shewn to be a son-in-law to the testator. Held, that he was an incompetent witness; though there was no further proof as to his interest.

THIS was an action of detinue, brought in the Circuit Court of Tuscaloosa county, in 1822, by John M'Kinney,

JULY 1829.

M'Kinney's  
Executors

v.

M'Kinney's  
Admrs.

his lifetime, against Sarah M'Kinney as the administratrix of Alfred M'Kinney, deceased, to recover two slaves. During the pendency of the suit, the plaintiff died, and the cause was revived by his executors; and also the defendant having intermarried, her husband was made a party defendant.

At the March term, 1827, the issue was tried by a jury, and a verdict was found for the defendants. The plaintiffs took a bill of exceptions, certifying, that on the trial, they offered the deposition of one Thomas Smith, a material witness for them; but the Court considering that said witness was a son-in-law of John M'Kinney, the plaintiff's testator, rejected his testimony as incompetent and inadmissible, unless the plaintiffs who offered the deposition, would first shew in evidence that he was not interested. There was no other evidence of his having any interest in the cause except that he was a son-in-law to the said John M'Kinney, and that he deposed after his death. It further appeared that the said testator lived and died a resident citizen of Virginia, and that at the time of his death, the property in dispute was in Tuscaloosa.

The plaintiffs here assign for error, that the said deposition was improperly rejected, and that it should have been read, as it was not shewn that the witness was interested.

BARTON and STEWART, for the plaintiffs. There was no other objection to the deposition but that of the deponent being son-in-law to the deceased, whose executors were plaintiffs; and this was certainly an insufficient objection in itself, to reject him as an incompetent witness. It must be admitted, that all witnesses are *prima facie* competent; and they will be presumed to be so, unless some disqualifying objection is shewn; and as all the presumptions of the law are in favor of the admissibility, the objection must be shewn, not presumptively or loosely, but positively and with certainty.<sup>a</sup>

The *kindred* or *connexion* of the witness to the deceased or to his heirs, constitutes of itself no objection whatever to his competency.<sup>b</sup> The only objection then must be on the ground of interest. Then what is the rule in relation to interest? To be disqualified, a witness must have an immediate, legal, present, certain and direct interest in the event of the suit.<sup>c</sup> This is uncontrovertibly the kind of interest necessary to be shewn. The next inquiry is, in what manner must the objection be shewn? It is not sufficient to shew that the witness *may* or *may not* be inter-

<sup>a</sup> 3 Stark. Evidence 1728.  
2 Ib. 392.

<sup>b</sup> 1 Stark. Evidence 84, 85.  
Gil. on Ev. 135, marg.

<sup>c</sup> 3 Stark. Ev. 1728-9.  
2 Ib. 744-5,  
756-8-9.  
40 & East 17  
1 Stark. Evidence 89.  
Bayards Evidence 100.

ated in the event of the suit, for this is not establishing the objection; the fact must appear with certainty, that he is interested. Here there is but a presumption shewn, and the fact of interest is not reached. It is a well established rule, according to the authorities, that notwithstanding a *prima facie appearance* of interest, that yet the witness should not be rejected without an examination as to his real interest and situation.<sup>a</sup> And it is further laid down, that great strictness and caution are necessary to be observed in rejecting a witness;<sup>b</sup> and that even in cases where it is doubtful if the witness be competent or not, it is more safe to admit the witness than to reject him, and to let the objection go to his credibility;<sup>c</sup> certainly this is the most safe rule, and more likely to reach the justice of the case. Courts have, in modern times, leaned much in favor of the admissibility of objectionable witnesses; and have felt more disposed than formerly to refer the objection to the jury to judge of from all the circumstances which can effect their credibility; and this doctrine is particularly applicable to this country, where the Courts are careful to exercise as little control over the jury and facts of a cause, as possible, whereas in England they rule the jury, and in fact often direct a non-suit, or direct the jury what verdict they must give. The question simply resolves itself into this, is a plaintiff, who offers a witness, bound to shew and prove that he is competent, or is it the duty of the party who makes the objection to shew and establish that objection? It is clear that the disqualifying objection must be proved by the party who makes it.<sup>d</sup> Then it is equally clear that to shew that Smith *may* or perchance *might* receive some benefit from the result of the trial, is not sufficient; he must shew that he *will*. What is the extent of the information afforded to the Court in this case? he is a son-in-law; but how stand the accounts? is the estate solvent? is not the contest for the benefit of creditors exclusively? has he not already received his portion of the estate as advancement? has he not received a special legacy by the will; and is not the property in dispute specially given to some one else? or is he not entirely excluded by the will? All those and many others, are questions as to which the Court is entirely in the dark; yet the fact of his interest depends on this being shewn; and it devolves on the defendants to shew that he is absolutely interested.

Another objection is this; it does not appear by the record that the fact relied on to defeat the evidence was

JULY, 1820.

M'Kinney's  
Executors.v.  
M'Kinney's,  
Admrs.

a 3 Stark. Ev.  
1734, marg.  
2 Stark. Ev.  
716-17.

b 14 John. Rep  
182, 82.  
13 John. R. 82.

c 1 Stark. Ev.  
88.

d 2 Stark. 757,  
note.

JULY 1829.

M'Kinney's  
Executorsv.  
M'Kinney's  
Admrs.3 Stark. Ev.  
1734.

proved by the *defendants*; had the objection been made by them, another question on the part of the plaintiff to the witness, might have sufficed to prove that he had in fact no interest at all: but no objection is made, and the fact of his being a son-in-law is only gathered from the tenor of the deposition. This surprises the plaintiffs; and it is the rule, that in taking evidence by deposition, surprise is never tolerated nor permitted.<sup>a</sup> The evidence being taken by deposition, shews the witness was out of the State, and in fact all the plaintiff's evidence comes from Virginia. The defendants should have been required before they could sustain the objection made by them as to interest, to have asked the witness as to his real situation in interest, to have shewn it by other means, or at least to have made the objection when the witness was examined, so that the plaintiffs might have themselves asked the question and avoided the surprise. At all events, it is now more safe for this Court to reverse and remand, in the absence of all knowledge, whether the witness be really interested or not, than to affirm and render the verdict irrevocable, be it right or wrong, of which the Court certainly must be in doubt at least.

SHORTTRIDGE and ELLIS, for the defendants.

By JUDGE WHITE. The only question insisted on in argument in this case is, that the Court below erred in rejecting the deposition of one Thomas Smith, taken for the plaintiff, on the ground that said witness was the son-in-law of the plaintiff's testator. In support of this position, it is urged that Smith, notwithstanding he was a son-in-law, might have had no real interest that would have rendered him incompetent; and that the defendant should have made a further shewing. Courts, in modern times, have leaned much against the rejection of witnesses; but it is a well settled rule that when they are directly interested in the event of a suit, or in the record as evidence, they must be excluded. In the present case, Smith's testimony must be viewed as tending to create or increase a fund, as part of the estate of his father-in-law, in which he might have been interested; and this was the reasonable presumption till the contrary appeared. True, it was not certainly the case; he might have been advanced to his full portion of the estate on his marriage; the will might have disposed of the whole

without leaving him any thing, and if any thing was left him, he might have released his interest. But if this was so, the plaintiff who expected to be benefitted by his testimony, should have been prepared to have shewn it. Could his competency be restored by a release, it was for the plaintiff to procure it; was he advanced on marriage, or disinherited by will; it is manifest, the plaintiff, who was the executor of his father-in-law, and had the possession of the will, could have produced it with more convenience, and more in accordance with the rules of evidence than the defendant, who, if required to shew such facts, would have had to have shewn the most, if not all of them, by negative proof. Again, we must proceed on general principles, and as defendants could not usually in such cases know of the intention to introduce the witness till the trial, if called on for a stronger shewing of interest than was required in the present case, they would be surprised, or compelled to rely on the *voir dire* of the witness himself, which would often be an unsafe resort. The fact of the testators dying in Virginia, does not vary the aspect of the question. It is so universally true, throughout the States of the Union, that children are all concerned in the distribution of estates, that we conceive the Circuit Court were right in permitting it to have the influence it had on their decision; and that Smith was to be presumed interested till the contrary was shewn.\*

Judgment affirmed.<sup>a</sup>

JULY 1823.

M'Kinney's  
Executors  
v.  
M'Kinney's  
Admr.

<sup>a</sup> See Strong's  
Exr. v. Finch  
Minor's Ala.  
Rep. 256.

### ALLEN V. BOOKER.

1. Assumpsit lies to recover back money paid on a parol purchase of land; such contract being void by the statute of frauds.
2. The payment of part of the purchase money, does not take the case out of the statute.

DRURY M. ALLEN brought an action of assumpsit in Madison Circuit Court, against Parham N. Booker, to recover back one hundred and twenty-five dollars paid by him as a partial payment on a purchase of land.

\*Note. This cause was at July Term, 1823, affirmed on argument; and the Court having consented to reconsider the cause, it was re-argued at this term, and again affirmed.

2s	21
96	523

JULY 1839.

Allen  
v.  
Booker.

At the trial in May, 1827, the plaintiff proved that he paid the money on account of a purchase of land made by him of Booker; that the contract was by parol; and that the land lay in the Arkansas Territory. The Court charged the jury, that the part payment of the consideration money by the plaintiff to the defendant, took the contract out of the operation of the statute of frauds; and that as the plaintiff could compel the performance of the contract on the part of the defendant, provided he complied with his agreement to pay the money, that he could not abandon the contract, and recover back in this action the amount paid. Under this charge, the jury found for the defendant. The plaintiff excepted; and assigns for error, in this Court, that those instructions given to the jury, were incorrect. <

a7 John. 206-7

1 Bibb 204-5.  
6, 584.

3 Bibb 2.

4 Bibb 58.

1 Marsh. 553

14 John. 29.

15 John. 504.

Houly v.

Brown.

1 Stewart

144.

2 Caine's Cas-

es in error.

87.

b1 Chit. Plead

marg. 41 342

THORNTON, for the appellant, argued: 1st. That by the correct construction of the statute of frauds, all actions are prohibited, which are founded on, and tend to enforce a parol contract for land.<sup>a</sup> And if this be correct, then that it follows as a necessary consequence, that the action to recover back money paid on such a contract is well founded.<sup>b</sup> And, 2nd. That should this Court even be disposed to enlarge the statute to the extent to which the English authorities had gone, when many of their judges had regretted it as an evil, that still, even according to their authorities, payment of purchase money is not enough to take a case out of the statute of frauds.<sup>c</sup>

c Sug. on Ven-  
dors 86 to 92.

KELLY and M'CLUNG, for the defendant in error. In contracts for the sale of land, the *lex loci rei sitae* governs; and the statute of frauds of the Territory of Arkansas, if any such statute is in existence there, is the rule for the decision of the right of the parties; and as it does not appear from the record that there is any such statute in force in Arkansas, there is no statute of frauds that is applicable. Although the reason assigned by the Court below for its charge may not be sufficient, yet the charge in itself is sound; and that is sufficient to sustain our judgment. The charge then in substance was, that the statute of frauds of Alabama did not apply, and this was correct.

If Allen had sued for a conveyance, or for damages for a breach of the contract, then Booker would have been required to prove that he had performed his contract according to the law of Arkansas. But it is not alleged by Allen that Booker is unwilling to comply; his action assumes a

JULY 1829.

Allen  
v.  
Booker.

---

right in himself to refuse to allow a performance by Booker, and that he has a right to avoid the contract and claim the money. He asserts that the contract is void. At common law the contract is valid and binding; this is *prima facie* enough for the defendant to shew. Allen replies to this, the statute of frauds of Alabama; the force of which objection is destroyed by Booker, by the proof, that the land lies in Arkansas, and that it must abide the law of that country, where this Court presumes the common law alone to be in force, in the absence of proof of the existence of any statute. This takes from Allen his only objection to the validity of the contract. The *onus* is thus thrown upon Allen to shew the law of Arkansas; and he not having shewn any, must fail. The Court will never presume that any thing was proved which does not appear, in order to reverse a judgment. Whoever assigns error, must shew by his bill of exceptions, that he did make all the proof he relies on.

THORNTON, in reply. The locality of the land is immaterial; that question was not the one reserved for revision here. There is no contest as to the existence of the statute of frauds in Arkansas; nor as to what statute of frauds should govern the cause, that of Alabama or that of Arkansas. The proof produced in the Court below is not set out; nor is it necessary it should be, for the purpose of revising the only point reserved, which is, whether or not the payment of part of the purchase money will take a case out of the statute; and if under the statute, the plaintiff could abandon the contract and recover back money so paid, or whether the plaintiff was compelled to claim or receive a conveyance as his only remedy.

The cause was argued at July term, 1828, and reversed and remanded. A re-hearing having been granted, the case was again argued at this term, when the opinion of the Court was delivered

By JUDGE TAYLOR. It is considered unnecessary to enter into a minute investigation of the doctrine which governs parol contracts for the sale of land, under the statute of frauds. Our statute is in the precise language of that of England, and of a majority of the States. The constructions given to the statute by the Courts of Westminster, are well known. They have determined many cases to form exceptions, notwithstanding the comprehensive terms of the statute; and numerous decrees have been made by



JULY 1830.

Allen  
v.  
Booker.

the Chancellors of that country by which the specific performance of such contracts has been enforced. The reasons for this departure from the letter of the statute, given in those decisions is, that in the several cases in which the decisions have been made, the defendants were endeavoring to use the statute to effect a fraud upon the plaintiffs; and that it could never have been the intention of the Legislature, that a statute made to prevent fraud, should be so expounded as to give a reward to him who practiced fraud.

It has been much questioned, even in England, whether the most correct course for the Courts to have adopted, would not have been rigidly to execute the statute in accordance with its words; and many of the most enlightened Judges of that country have expressed great regret that it has ever been departed from, except in cases of a most extraordinary nature. In modern times, there is a much greater indisposition to decree the specific performance of a contract of this description than formerly: and the Courts manifest a great inclination again to take shelter under the wings of the statute, from which they had so greatly departed. The observations of Lord Redesdale, in *Lindsay v. Lynch*,<sup>a</sup> indicate this in strong terms.

<sup>a</sup> 2. Schoales  
and Lefroy 5.

In the United States, the cases uniformly shew, that the Courts are rather inclined to restrict than to enlarge the cases of exception to the strict execution of the statute. In the case of *Grant v. Naylor*,<sup>b</sup> that distinguished Judge, Chief Justice Marshall, observes, "already have so many cases been taken out of the statute of frauds which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best Judges in England have been of opinion, that this relaxing construction of the statute ought not to be extended further than it has already been carried, and the Court entirely concurs in that opinion."

<sup>b</sup> 4 Cran. 235.

In some of the States it has been determined, that the statute must be rigidly construed, and that no case whatever the circumstances may be, will authorize an exception.<sup>c</sup>

<sup>c</sup> 1 Bibb R. 204.

<sup>3</sup> Bibb 2.

Also the case  
of *W'Clure v.*  
*Patten*, lately  
decided by  
the Court of  
App. of Ten  
nessee.

I am not prepared to go the length of the cases last cited. Our statute was enacted long after the construction given to that of England by their Courts, was known in this country; and we cannot suppose that the enlightened body which enacted it, was ignorant of the course pursued by the English Courts. If it had been intended to preclude the

JULY 1839.

Allen  
v.  
Fooker.

Courts from departing from the letter of the law, words to that effect might easily have been inserted. But in the variety of decisions on this subject, I do not now recollect one which determines that the payment of part of the purchase money authorizes a decree of specific performance; nor can I conceive any good reason for such a decision. To authorize a departure from the statute in any case, the party asking it should be so situated, that no other remedy which the law can afford him, would place him in as good a situation as he was before the contract was made; in fact it must satisfactorily appear that the opposite party is using the statute as an engine of oppression. This would often be the case where possession had been given, and extensive improvements made by the purchaser. But in the present case, the defendant is the vendor, and the repayment of the money by him, will merely place him where he was before the contract was made, which would always be the case, in all instances, where there was nothing done by the parties to the contract, but simply the payment and receipt of the purchase money.

I am therefore clearly of opinion, that neither the payment by the purchaser of a part or even the whole of the purchase money in such case, would of itself, take the case out of the statute. Therefore, the Court erred in the instructions given to the jury.

But it is objected, that even should there have been error in this respect, yet the judgment cannot be reversed, for two reasons: 1st, By the terms of the statute, no suit is authorized to recover back the purchase money which has been paid; and 2d. The land which was the subject of the contract, is situated in the Arkansas Territory, and the contract must be governed by the laws of that Territory; and it does not appear to have been proved on the trial of the cause, that any such law has been enacted, in that Territory, as our statute of frauds.

The statute of frauds enacts, "that no action shall be brought whereby to charge the defendant upon any contract for the sale of lands, tenements or hereditaments, or the making any lease thereof, for a larger term than one year." The clear object is to prohibit any suit to recover damages for the breach of, or to enforce the agreement. But the present is not brought for either of these purposes, but is to recover money which the plaintiff alleges he has paid without consideration. The object is not to charge the defendant upon a contract by parol for the sale of lands,

JULY 1829.

Allen  
v.  
Booker.a 1 Marshall's  
Rep. 552.

b 1 Bibb 203.

c Page 206.

d 15 John. R.  
503.

but to recover back money which the plaintiff alleges the defendant has received of his. There is certainly no more danger of the commission of a fraud or perjury in a case of this kind, than in any other action for money. The reason of the law, therefore, does not extend to the case. But I am not left to determine from reason alone; express authority is easily adduced on the subject. The case of *Hunt v. Sanders*,<sup>a</sup> is precisely in point. That was an action of assumpsit, for money had and received, instituted by Sanders in a Circuit Court of Kentucky, to recover from Hunt, a sum of money paid by him to the defendant on a parol contract for the purchase of land. The statute of that State is precisely the same with ours, and a recovery was had in the Circuit Court, and the judgment affirmed in the Court of Appeals. In the case of *Grant's heirs v. Craigsmiles*,<sup>b</sup> in delivering the opinion of the Court,<sup>c</sup> which dismisses the bill filed for a specific performance of a parol contract for the purchase of lands, Judge Bibb observes "But this is only a partial evil resulting from a general good; an evil however not entirely without redress, since a person who has paid a consideration, deemed valuable in law, may have an action to recover back the consideration; although he cannot have the land itself for which it was paid." In *Myer v. Fisher*,<sup>d</sup> the Court observe: "But there is another ground on which the plaintiff had good right to recover the money received by the defendant on that note. It was received by the defendant without consideration; the contract for the exchange of farms was void by the statute of frauds, being by parol only." There can be no doubt, therefore, but that the suit is well brought.

As respects the last point, the question which it involves does not legitimately come before us on this investigation. An exception taken to the opinion of a Court, is generally accompanied by so much of the testimony given on the trial, as is sufficient to shew plainly the connection and materiality of the charge excepted to, with a correct decision of the case by the jury; and no more. It is not necessary to set out in the record, all the evidence which has been adduced in a cause, when much of that evidence can have no direct bearing upon so much of the charge of the Court as is objected to by the counsel taking the exception; nor will the appellate Court ever presume, that all the testimony adduced before the inferior tribunal is set out in the record, unless it is so declared to be, or unless it is perfectly evident from the record, that such is the fact. A contrary prac-

JULY 1820.

Allen  
v.  
Booker.

It would often burden records with much useless matter, and greatly enhance the costs of parties. In this case it does not *certainly* appear, whether it was on the statute of Arkansas Territory or of this State, that the charge of the Circuit Court was founded. It is true, the probability is, it was on the statute of Alabama; but from the record, it possibly may have been otherwise. But even were it on the statute of this State, the Court may previously have determined that the contract was governed by the laws of Alabama, or the question may never have been raised below, when if it had, and the production of a statute of Arkansas like our own was required, the plaintiff might either have produced the law; or if he knew it existed, suffered a nonsuit; or upon an affidavit of surprise, applied for a new trial.<sup>a</sup> I am, therefore, of opinion, that this last is no ground upon which the judgment can be affirmed.

a11 Whea. 81.

For these reasons the judgment must be reversed, and remanded. And of this opinion is a majority of the Court.

Judge SAFFOLD, not sitting.

## JOHNSON v. HOWE's Admr's.

1. In authenticating records under the act of Congress, it must appear that the Judge who certifies, is the presiding magistrate of the particular Court or district.
2. It must also appear that the Clerk who certifies, was Clerk at the date of his certificate. If this be uncertain, the authentication is insufficient.

JOHN JOHNSON brought an action of debt, in the Circuit Court of Lauderdale county, against Richard M'Mahon, administrator, and Isabella Howe, administratrix of William Howe, deceased; to recover the amount of a judgment which he had obtained against Howe in his lifetime, in the Court of common pleas of Lancaster district in South Carolina.

The plaintiff offered in evidence at the trial, a transcript of the record from South Carolina, which was authenticated by the certificate of William M'Kenna, Clerk of the Court of Common Pleas of Lancaster district, dated the 12th of November, 1823, under the hand of the Clerk, with the seal of the Court. This certificate was attested by the Judge in the following words "I John S. Richardson, one of the Associate Judges of said State, and a presiding Judge of the

JULY 1829.

Johnson  
v.  
Howe's Admr

Courts of Sessions and Common Pleas, do hereby certify that William M'Kenna, whose name appears to the above certificate, is clerk of the Court of Sessions and Common Pleas for the said district of Lancaster; that the said certificate is in due form, and that due faith and credit ought to be given to his official signature

J. S. RICHARDSON, *Associate Judge.*"

The defendants, having pleaded *nul tiel record*, objected to the introduction of said transcript for want of due authentication; the objection was sustained and the transcript rejected, and the Court gave judgment for the defendants. To this the plaintiff excepted, brought the cause to this Court, and assigned for error this decision of the Court.

COALTER, for the appellant. The only objection made to the reception of the record below as evidence, was, that the certificate of the Judge did not prove that M'Kenna was Clerk at the time of the date of the certificate, but only states that he is Clerk, meaning when the Judge gave his certificate. There is no date to the Judge's certificate. If we are to rely on presumptions, it would be more fair to presume that the Judge's certificate was given on the same day with the Clerk's, in support of the proceedings, than to presume that it was given at a different time, and that at that other time, some one else was clerk, in order to destroy the certificate.

If it is necessary to call in presumptions, I think it might fairly be presumed, that immediately on the Clerk's giving his certificate, the Judge certified; and did so in allusion to to the time mentioned in the Clerk's certificate; that is, the 12th of November, 1823; meaning that he was Clerk at that time. Fictions and presumptions will never be sought after to destroy, but will, to support proceedings, which are otherwise, or *prima facie*, regular.

W. B. MARTIN, for the defendants. The record should be so certified with proper dates, as to be complete in itself, without any extrinsic proof. No extrinsic proof could be received to supply any omission; and if it could, none such was offered. But there is no case where parol proof has been received to supply an omission in a record; though it may in some cases be received to supply the want of a date in a deed or note.

The act of Congress must be so familiar to the Court, that it is probably unnecessary to refer to it. This case does

not come within it. The appellant presumes that the Judge certified the record at the time the Clerk did. I have a right also to presume that it was done at any other time afterwards, even a year or two after, when perhaps another Clerk may have been appointed. It is too doubtful to leave a case to presumptions when there is no foundation for them. It will be found that in a great majority of the transcripts certified, the dates of the certificates of the Clerk and Judge are different; we therefore cannot rely on any presumption growing out of usage in this respect; and here the uncertainty is the greater, as the certificate bears no date at all.

JULY 1820.  
Johnson  
v.  
Howe's Admr

In this, as in all other cases, the plaintiff must prevail by the proof he makes to support his complaint, and cannot rely on strained presumptions; nor can any thing be presumed when it is susceptible of so clear proof, as the existence of a record. The best proof must be produced.

By CHIEF JUSTICE LIPSCOMB. The Judge sets out in his certificate that he is an Associate Judge of the State, and presiding Judge of the Courts of Session and Common Pleas; but does not set out that he is presiding Judge of Lancaster District, where the judgment was rendered. If the organization of the Courts of that State are such as to make each of the Judges the presiding Judge throughout the State, the certificate should have so stated it; otherwise we cannot be judicially advised of it. If the certificate had set out that he was presiding Judge for the district of Lancaster, or for the Courts of the State, it would have come within the act of Congress. We believe there was no error in rejecting the evidence on this ground.

There was another objection taken to the certificate of the Judge. He certifies that the Clerk is Clerk of the Court, but does not certify that he was, at the date of the Clerk's certificate. We are of opinion that it should be attested by the certificate of the presiding Judge, that the Clerk was Clerk at the date of his signature; more especially where the Judge's certificate bears no date, or one different from that of the Clerk.

Judgment affirmed. \*

---

\* See the case of Huff v. Campbell, 1. Stewart's Rep. 543. Also the case of Buel v. Van Ness, 8 Wheaton, 320 321.

JULY 1828.  
 The State  
 v.  
 Tombeckbee  
 Bank.

### THE STATE V. THE TOMBECKBEE BANK.

2a 30  
 132 56

1. The charter of the Tombeckbee Bank is not forfeited by a failure to pay specie on demand for its notes. There being no provision to that effect expressed therein.
2. A charter is a contract, and the act of 1821 declaring the charter of the Tombeckbee Bank liable to forfeiture for a failure to pay specie on demand for its notes, is not binding on, and cannot affect the Bank; as it amounts to an alteration of the terms of the contract, without the consent of the Bank.

On the 25th of September, 1828, a writ of *quo warranto* was sued out from the office of the Clerk of the Circuit Court of Washington county, at the instance of the Solicitor of the first Judicial Circuit, in behalf of the State of Alabama, against the President Directors and Company of the Tombeckbee Bank.

a. Tombeck-  
 bee Bank  
 charter,  
 Laws of Ala.  
 page 40.

The writ recited, that whereas an act was passed by the Legislative Council and House of Representatives of the Alabama Territory, on the 13th of February, 1818, entitled, "An act to establish the Tombeckbee Bank in the town of St. Stephens," it is provided that there shall be established in the town of St. Stephens a Bank, &c. (here the act of incorporation is set out.)<sup>a</sup> And whereas the said President Directors and Company, did after the passage of said act, issue notes, receive deposits, make discounts, carry on banking operations and other monied transactions, as usually performed by banks, &c. And whereas from the 27th of June, 1827, till the date of the writ, at their banking house, they had wholly failed to pay specie on demand, contrary to the true intent and meaning of the said act; and had also after they went into operation taken more than at the rate of six per cent per annum on loans and discounts; and had also neglected to proceed annually to the election of thirteen directors to superintend their affairs as required by said act: Therefore the said President, Directors and Company, were required to appear, &c., and answer to the State, wherefore, after said breaches, and by what authority they continued to exercise the privileges of a banking company; and to shew cause why their corporate powers should not be declared forfeited, and said Bank dissolved, &c.

The attorney for the Bank acknowledged service of the writ, and at the return term filed the plea of not guilty. The cause was at the same term submitted to the Court on the evidence of Robert H. Crosswell, introduced by the

JULY 1829.

The State

v.  
Tombeckbee  
Bank.

State, who deposed, "that the Tombeckbee Bank had not paid specie for its notes on demand, or when requested, since the 1st of June, 1827, up to the time of trial; that he was the first Teller of said bank for many years previous to and up to the time of its failing to make specie payments. That in its operations as a bank, when notes were by it discounted, the practice invariably was, on discounting notes at ninety days, to charge interest at six per cent per annum for ninety-four days; that the Bank had invariably allowed to the drawers and securities three days grace on notes so discounted." And it was agreed that the legal questions growing out of said evidence should be referred to the Court for a decision, whether said bank charter had from the law and facts been violated and forfeited, or not; and a judgment *pro forma* by consent was entered for the defendants.

This judgment is by the counsel for the State in this Court, assigned for error.

SALLE and KELLY, for the State. The obligation on the part of the Bank to pay specie for its notes, though not expressed in so many words, is plainly deducible from the charter, and, from the nature of the subject, must be held as an indispensable condition of the continuance of the franchise: It is indispensable to the wholesome exercise of it; without the payment of specie, the object for which the Bank was created fails. The public benefits which were the equivalent to be received for the grant, are not realized. It certainly must be implied that the Bank will redeem its notes when presented; and if so, the obligation is as strong as if expressed. It is then properly to be considered as an implied condition in law.<sup>a</sup>

A corporation created by the Legislature forfeits its charter by *nonuser* or *misuser*, and in such case the State may, by *quo warranto*, resume the franchise.<sup>b</sup> The taking of interest, habitually, above six-per cent, the rate fixed by the charter, was a misuser amounting to usury.<sup>c</sup> And the failure to pay specie for its bills, was such a misuser and abuse of the franchise, in connexion with the usury, as amounted to a forfeiture.<sup>d</sup> The suffering of an act to be done which deprives a corporation of the power of continuing business, is sufficient to create a forfeiture.<sup>e</sup>

The act of 1821,<sup>f</sup> provides the method of proceeding to declare the charter forfeited. But it was forfeited without the aid of this act, by the violation of an implied condition. An act providing a particular form of remedy can as well

<sup>a</sup> 2 Thomas's  
Coke, 132 to  
141.

<sup>4</sup> Whea. 658,  
Dartmouth  
College v.  
Woodward.

<sup>4</sup> Whea. 513  
651, 706.

The State v.  
R. Stebbins  
et al.

<sup>1</sup> Stewart 299  
<sup>b</sup> 9 Cran. 45, 51

<sup>c</sup> 2 Cowen 769.

<sup>d</sup> 6 Cowen 217

<sup>e</sup> 19 John. 456,  
<sup>f</sup> Laws of Ala.  
page 62,



JULY 1829.

The State  
v.  
Tombeckee  
Bank.

be passed after the enactment of the charter as before. Besides this is not to be considered as a private corporation, nor tested by the rules of private right. It is a *quasi* public corporation, and such can be regulated by enactments at all times, when the public good or public interest requires it.

Minor's Al.  
Rep. p. 23.

HOPKINS and HITCHCOCK, for the defendants. It is alleged that from the 17th June, 1827, till the 25th September, 1828, the Bank failed to pay its notes in specie on demand; and it is prayed that its charter may be adjudged forfeited. In the case of *Logwood et al v. The Huntsville Bank*,<sup>a</sup> this Court decided that a charter is a contract, the terms of which cannot be varied by either of the contracting parties without the consent of the other. The Court in that case use the following emphatic language, "any attempt to alter or abridge the provisions of that charter, without the consent of the individuals composing the corporation, would not be valid. So long as it confines itself to the provisions of its grant, the corporation is omnipotent, and independent of any legislative control." An important inquiry then is, whether there is any provision in the charter which declares that it shall be forfeited on a failure by the Bank to pay specie for its notes. It will be found upon examination that there is no such provision, and none such can be implied; but on the contrary, from the tenor of several of the provisions of the charter, an implication directly opposite arises. The general law of the land governing all corporations and individuals, would give a recovery of the amount of the note, and eight per cent interest by way of damages. But the Legislature has given an additional remedy; for it is expressly provided that the *stockholders* may be proceeded against, jointly and severally, and in a particular *summary way*, and yet this shall not exempt the *corporation* from liability. This is the penalty provided for the non-payment, and the grantors of the charter did not think proper to add any other: they never intended that the corporation should be dissolved on failure to pay its notes, else they would have said so. If a dissolution was to take place on such a failure, how useless would be that provision in the charter which says, that proceeding against the stockholders "shall not be construed to exempt the said *corporation*, or the lands, tenements, goods or chattels of the same, from being also liable." It cannot be supposed that the legislature presumed proceed-

JULY 1839.

The State  
v.  
Tombeckbee  
Bank.

ings would be had against the stockholders when the Bank had not refused to pay. They have then, in the event of the Bank's refusal to pay its notes, provided certain remedies against it; against the corporation; which corporation must, therefore, continue to exist after such failure to pay. Useless indeed would be that provision in the charter which gives to the creditor the right to sue, if the failure to pay, which alone gives the right to sue, should deprive the corporation of existence, and of course the suitor of the right to sue.

What would be the situation of the holders of the notes of the Bank, if the suspension of specie payments deprived the corporation of existence? It would be the same as if the charter had expired by its own limitation. When a corporation expires, all the debts due to and from it, die with it. The holders of the notes of the Bank would, therefore, upon a dissolution of the corporation, be without a remedy, and would sustain a loss to the entire amount of the notes which might be in their possession. It is therefore manifestly to the interest of all who hold notes, that the charter should not be declared forfeited.

The decision of the Supreme Court of New-York, shews that the suspension of specie payments is not a cause of forfeiture of a bank charter.<sup>a</sup> The refusal to pay specie is a contingency contemplated by the charter of the Tombeckbee Bank, and is provided for, by authorizing a suit against the stockholders, as well as against the corporation, and the recovery of principal and interest. At the time the charter was granted, suspensions of specie payments by Banks were of common occurrence, and certainly in contemplation of the Legislature; and those remedies were provided. But if no provision had been made for such a case, it would not have been in the power of the Court to provide for it by judicial decision. The Court are not left in doubt as to the terms of this contract; it is reduced to writing; from that writing alone, the rights and obligations of the parties must be ascertained, and from it, the disabilities and forfeitures which may be incurred. It must be interpreted according to its terms: *Expressum facit cessare tacitum*.

If the suspension of specie payments, even for the most salutary purposes, would work a forfeiture of the charter of a bank, without any provision in its charter to that effect, not a bank in the Union, south of Boston, would have survived the termination of the late war. Every banking institution

<sup>a</sup> The People v. Washington and Warren Bank, 6 Cowen 215, 219.

JULY 1822.

The State  
v.  
Tombeckee  
Bank.

2 Laws of Ala.  
page 62.

south of Massachusetts found it necessary, in those times of trouble and danger, to suspend specie payments; and continued that suspension till the year 1817. At the latter period, they resumed specie payments, and no one, however desirous to promote the public weal, ever questioned the right of any of them to continue as a corporation.

It is said, that by the act of the 17th December, 1821, power is given to declare the charter forfeited. According to the decisions of this Court, and indeed all Courts whose decisions deserve respect, this charter, or this contract, cannot be affected by this act; it is the act of one of the contracting parties, without the consent of the other; therefore the power given by it is void; and it cannot authorize this Court to declare the charter forfeited, and the corporation dissolved. The passage of this act amounts indeed to an admission on the part of the State, that the suspension of specie payments is not, according to the bank charter, a cause of forfeiture; and that it does not work a dissolution of the corporation: for if such was the case, where is the necessity of this act? It is then an admission, that the power the State now seeks to exert over the corporation, was not reserved to it by the act of incorporation; and by the immutable law of right, that act could not give to one of the contracting parties, this power over the rights of the other. It does not therefore exist.

The 6th rule regulating the establishment of banks, contained in the constitution of Alabama, is in the following words; viz: "In case any bank or branch bank shall neglect or refuse to pay, on demand, any bill, note or obligation, issued by the corporation according to the promise therein expressed; the holder of any such note, bill or obligation, shall be entitled to receive and recover interest thereon, until the same shall be paid, or *specie payments are resumed* by the said bank, at the rate of twelve per cent per annum, from the date of such demand; unless the General Assembly shall sanction such suspension of specie payments; and the General Assembly shall have power, *after such neglect* and refusal, to adopt such measures as they may deem proper, to protect and secure the rights of all concerned, and to *declare the charter of such bank forfeited.*" It is manifest, from this part of the constitution, that the convention did not consider the charter of any bank in this State forfeited by a suspension of specie payments. They knew they had no power over any bank which then existed. By virtue of this provision, the charter of a bank,

even subsequently established, could not be declared forfeited by virtue of any law passed anterior to the suspension of specie payments.

The contract made by the Legislature with the Huntsville Bank, and the consideration given for the amendment of the charter, after the suspension of specie payments, is conclusive evidence that the charter was not forfeited by virtue of any provision in its charter, nor yet by the act of 1821. Nor can this last mentioned act, as it affects to do, dispose of the "effects, rights and credits" of the Bank. When a corporation is dissolved, its "effects, rights and credits," go with it to eternity. The proceeding, therefore, which seeks to dissolve the corporation of the Tombeckbee Bank, tends to inflict on the community irreparable injury. When the corporation is once dissolved, all the debts due from it are paid; its notes necessarily die in the hands of the holder. We therefore advocate the interest of the community as well as maintain the rights of the institution.

The act of 1821 does not however apply to the Tombeckbee Bank, and the proceeding instituted against it is founded in error. The third section of the act provides, that "if any incorporated bank within this State, shall not at the expiration of six months after the passage of this act, make regular specie payments for any of the bills or notes it may have issued, the Governor of the State shall give information of the fact to the Solicitor of the Circuit in which the Bank may be situated, directing him forthwith to proceed against the said bank, on a writ of quo warranto." If therefore, the Tombeckbee Bank did, at the expiration of six months after the passage of the said act, pay specie, it is not embraced by the act; and is not liable to the forfeiture which it attempts to impose. It is a fact, that the said Bank did on that day pay specie; and nothing to the contrary is alleged in the record. The penalty is not therefore incurred. It is not for us or the Court to say why the Legislature passed such an act. They have passed it, and it is the province of this Court to construe it. The words are plain, and admit of only one interpretation. If the Bank paid specie at the expiration of six months from the passage of said act, it is exempt, according to the terms of the act, from the penalties which it attempts to impose. If the words were doubtful, the Courts duty would be rather to restrict, than to extend the operation of so penal a statute.

But it is to be supposed, that the Legislature intended that the act should conform to the provisions of the constitution

JULY 1822.

The State  
v.  
Tombeckbee  
Bank.

**Syllabus.**  
**The State**  
**v.**  
**Tombekbee**  
**Bank.**

in relation to the dissolution of any bank which might be established under it. Those provisions authorized the Legislature, as has been stated, by an act *passed after the suspension of specie payments* by any bank thus established, to declare the charter of such bank forfeited. The constitution did not authorize the Legislature, nor did they intend, by any law passed before the suspension of specie payments, to deprive any bank of its charter.\*

KELLY, argued in reply.

By JUDGE CRENSHAW. This was a proceeding on a *quo warranto*, calling on the Tombekbee Bank to shew cause why its charter should not be adjudged to be forfeited; on the grounds: 1st, Because the Bank has failed to pay specie on demand for its notes; 2d. Because the bank has, on loans and discounts, taken more than six per cent per annum; And 3d. because the Bank has neglected to elect annually thirteen directors. The second and third grounds have been abandoned. The first, is alone relied on; and is now urged as sufficient to reverse the judgment which was given *pro forma* in favor of the Bank.

In the creation of every corporation, it is implied in law, that a *misuser*, or *nonuser*, shall effect a forfeiture of the charter. It is therefore important to inquire, whether a failure to pay specie is such a *misuser*, or *nonuser*, as will work a forfeiture of the charter. The act of incorporation has not so declared it, it is not so expressed by the letter of the act, nor can it be fairly inferred by implication.

\* 6 Cowen.  
 215, 219.

The Supreme Court of New York\* has decided, that the suspension of specie payments is no cause of the forfeiture of a bank charter, unless a provision to that effect be inserted in the charter.

The refusal to pay specie was a contingency contemplated by the act of incorporation; and was provided for by authorizing suits as well against the stockholders as against the corporation. The Legislature therefore, at the time of its creation, did not consider this as a cause of forfeiture. The act of incorporation was in the nature of a

\* The argument of the counsel for the Bank, on the charge of taking more than six per cent interest, is omitted, as that point was abandoned by the counsel for the State. The authorities cited by them on this point were, 2 Blk. Rep. 865; 1 Bos. and Pull. 151; 1 Saunders 295; 19 Johnson 500; Cro. Car. 501; 2 Vent. 83, 107; Cro. Jac. 678; 1 Campbell 149; Wright v. Elliott, 3 Stewart's Rep. 391; Lyon v. The State Bank, 1 Stewart 442.

contract between the State and the corporation, and it was incompetent to the Legislature, by any subsequent act, to annex new conditions, not expressed in the charter.

In the case of *Logwood against the Huntsville Bank*, decided in this Court, at a former term,<sup>a</sup> it was declared that a bank charter is in its nature and effect a contract, and that its terms cannot be varied or altered by either of the contracting parties, without the consent of the other. In that case, the Court says, "that any attempt to alter or abridge the provisions of the charter, without the consent of the individuals composing the corporation, would not be valid. And so long as it confines itself to the provisions of the grant, it is independent of legislative control."

The act therefore, of December, 1821, has no application to the case before us. That act provides, that if any incorporated bank within this State, shall not at the expiration of six months after the passage of the act, make regular specie payments, it shall produce a forfeiture of the charter, &c. This act cannot affect the bank charter, because the act was passed subsequently to granting the charter, without the consent of the members of the corporation; and annexed a cause of forfeiture which was unknown to the charter.

It might also with some plausibility be contended, that the section of the act relied on has long since expired by its own limitation; that the act intended to give the banks of the State, six months from its passage, in which to resume specie payments, and if at the expiration of six months they failed to pay specie, the charter would become forfeited. But it is not necessary to resort to a construction of this act in order to attain a correct conclusion in the case under consideration.

The Court are unanimous in the opinion, that a failure to pay specie, does not, by the terms of the act of incorporation, amount to a forfeiture of the charter; nor is it implied by the general law, as applicable to corporations: That the act 1821, relied on, having annexed a cause of forfeiture unknown to the act of incorporation, and without the consent of its members, cannot bind the corporation.

Judgment affirmed.

The CHIEF JUSTICE and Judge SAFFOLD not sitting.

*REPORTER*

The State

v.

Tombuckbee  
Bank.

<sup>a</sup> Minor's Ala.  
Rep. p. 23.

JULY 1839.

Keath  
v.  
Patton.

## KEATH V. PATTON.

1. A bill of exceptions must be explicit in setting out the necessary facts to shew the error; and the Court will not intend that there were other facts proved than those stated.
2. *Semle.* That trover lies to recover back the value of property paid under a parol contract for the sale of land, such contract being void.

THIS was an action of trover brought by Gabriel Keath, against Robert Patton, in the Circuit Court of Morgan county. The plaintiff declared against the defendant, for the conversion of five horses, of the value of \$333 33. At April term, 1827, a trial was had on the plea of not guilty, and a verdict was found for the defendant. On the trial, the plaintiff tendered a bill of exceptions, which was sealed, and is in the following words: "Be it remembered, that on the trial of this cause, the plaintiff proved, that he and the defendant made a parol contract in the State of Kentucky, for the sale of land by the defendant to the plaintiff; and that the plaintiff paid over to the defendant horses, under said parol contract, for and in consideration thereof. Upon this evidence, the Court instructed the jury, that the plaintiff could not recover in the form of action adopted by him; to which opinion the plaintiff excepts," &c. The matter of this bill of exception is the error assigned by the plaintiff in this Court.

THORNTON, for the appellant. The principle was decided in the case of *Allen v. Booker*,<sup>a</sup> that *money* paid on a parol contract for land, may be recovered back in assumpsit; therefore, if *property* has been paid on such a contract, detinue lies for it, or trover for its value. I readily admit, that to support either of those actions, there must necessarily be proof of a demand of the money, or of the property paid; for although it be true that the contract is void, and that either party has the right to declare it so, yet, it would be unjust to permit the party who chooses to declare it a nullity, to put the other to the costs of a suit in assumpsit for money paid, or by an action of trover or detinue, where property was paid, to make the vendor a purchaser of the property paid, contrary to his intention; which would be the consequence of allowing the purchaser of the land to sue for either without a previous demand of restitution. But I resist the idea that a demand must be

<sup>a</sup> Ante page 21

JULY 1859.

Keath  
v.  
Patton.

made of the *land*, or of a *conveyance* of it; for it would be idle to demand that, which under the statute, I could refuse to receive even if tendered; for the whole contract is *void*, at the option of either party. The want of explicitness in the bill of exceptions seems to be the only difficulty. It is evident that if it be considered that the bill of exceptions contains *all* the evidence offered, there is no error; and the charge, that the action cannot be sustained, would be maintainable; for I have admitted that a demand is necessary; and even the want of proof of the "value of the horses," under such a construction, would be a sufficient objection to a recovery. But in drawing the bill of exceptions, there was no attempt made to set out the evidence; it was drawn solely to bring to the view of the Court so much of the proof as was necessary to present the point on which the decision below turned.<sup>a</sup> It is true, that in the Court below, there was an objection made for the want of a demand of a conveyance of the land, and also a contest as to whether the statute of limitations of the place of contracting, or the place of trial, should govern; yet the counsel for the appellant felt assured, that the main question was, whether the payment of horses by the plaintiff, on the parol contract for the land, was such a part performance as would take the contract out of the statute of frauds. The opinion of the Judge who presided below, appeared to be, as understood by the counsel, that the plaintiff by bill in chancery could compel a conveyance of the land, and therefore that in this "form of action," no recovery could be had at all. This was the only point which it was intended to present for revision; and such would naturally be the form of a bill of exceptions, when it was only intended to present the question, whether property paid under a parol contract for land could be recovered back under the statute of frauds and perjuries, as if no contract had been made; the proper rule being to swell the record no more than is absolutely necessary to shew the point reserved. I am aware that a bill of exceptions is a part of the record below, and cannot be amended here, but it certainly must be *construed* here; and even if doubtful, the Court would always rather incline to such construction as would leave the matter open for further proof, than by an affirmance conclude the case forever from further examination. Had the question been settled that a recovery was possible in such an action, and the objection relied on, been, that there was no demand of the property, the defendant should have caused it to ap-

<sup>a</sup> Ante p 26.



JULY 1839.

Heath  
v.  
Patton.

---

¶ 1 Marsh. 23.

pear that there was no such evidence; and have raised the objection for his own benefit. The very phraseology of the bill of exceptions would seem, when closely examined, sufficiently to shew, that our construction is correct; for it may well be implied without repugnance to the expressions of the bill of exceptions, that the Judge was of opinion that the bill in chancery was the proper remedy, and the only one; but it excludes the idea of any scarcity of proof actually made which induced the charge, for had there been a deficiency or want of proof of demand, it would have affected the right of recovery in that particular action, but this could have had no influence on the right to recover in the form of action adopted; and the charge of the Court is emphatically, that a recovery could not be had under any circumstances, in the form of action adopted by the plaintiff: proof of a demand of the property, land, or deed, could not in anywise affect the question, as far as the "*form of the action*" was concerned.<sup>a</sup>

CLAY and M'CLUNG, for the defendant.

By JUDGE COLLIER. The only inquiry presented to the Court, is, whether trover is maintainable upon the facts on the record. To sustain that action, it is necessary for the plaintiff to prove a property in himself, and a right to the possession, at the time of the conversion by the defendant; a conversion by the defendant; and that the chattel alleged to have been converted was of some value. Neither of these essentials seem to have been proven on the trial. If therefore the testimony recited in the bill of exceptions be exclusive, it is clear that the instructions of the Court were correct.

It is argued, however, by the counsel for the plaintiff, that all the evidence given on the trial, cannot be supposed to be spread upon the record; and that consistently with the facts there stated, the Court may inquire whether the statute of frauds does not prevent a parol contract for the sale of lands from acquiring any validity, and authorize the purchaser, to recover from the seller, the consideration which may have been paid him on the footing of such contract. The language employed negatives the idea that other testimony than that recited was offered: it is set out with some precision, and the opinion of the Court seems to have been predicated upon it. In the instructions, nothing is said by the Court in relation to the statute of

frauds, or whether the payment by the plaintiff prevented its operation: but the only point which appears to have suggested itself to the Court was, whether the plaintiff's evidence entitled him to a recovery.

JULY 1839.

Keath  
v.  
Patton.

The plaintiff might without a previous demand and refusal to deliver the horses, have recovered in detinue, if the defendant had refused to perform his contract; unless the defendant had already converted them; and the Court may perhaps have had in view that form of action, when it says the one adopted is not sustainable. If the formal requisites in this action had been satisfied by proof on the trial, the judgment would be reversed upon the authority of the case of *Allen v. Booker*,<sup>a</sup> decided at this term; but the principle decided in that case is not presented by the exceptions for adjudication here. The Court is therefore constrained to affirm the judgment.

<sup>a</sup> Ante p. 21.

Judgment affirmed.

Judge TAYLOR dissenting.

Judge SAFFOLD presided below, and did not sit.

### WILLIAMS et al. v. LEWIS.

1. Where a writ was issued against three, and was served on two persons only, judgment on a declaration against the three is erroneous, though the record recites that "the defendants by their attorney waived their plea."
2. Such appearance will be considered as the appearance only of those served with process.
3. And the judgment is erroneous as to all; there being no discontinuance as to the one not served with process.

THE facts as shewn by the record in this cause are as follows: A writ of *capias ad respondendum*, in debt, was sued out by Henderson Lewis, against Benjamin M. Williams, Mary M. Mitchell and Charles M. Mitchell, returnable to the fall term, 1823, of Franklin Circuit Court. The sheriff returned that it was executed on Benjamin and Mary Mitchell, and that Charles Mitchell was not to be found. The plaintiff declared against the three defendants, as if in custody. No plea appears in the record; but at March term, 1825, judgment was rendered for the plaintiff in the following words: "This day comes the parties by their

JULY 1839.  
 Williams et al.  
 v.  
 Lewis.

---

attorneys, and the defendants by their attorney waiving their plea, say nothing in bar of the plaintiffs action: It is therefore considered by the Court, that the plaintiff recover against the defendants," &c.

KELLY and HUTCHISON, for the appellants, who were defendants below, insisted, that a discontinuance should have been entered as to the defendant, Charles Mitchell; and that it was erroneous to render judgment against all the defendants, on one of whom, process had not been served.

WOOLDRIDGE, for the appellee, argued that the objection was waived by the defendant's appearance and waiver of their plea.

By CHIEF JUSTICE LIPSCOMB. The names of the particular defendants who waived their plea are not given, nor is the plea itself set out. If there had been a general appearance for all the defendants, they would have been estopped from saying the writ had not been executed. It would be presuming too much, to say that this record shewed that Charles L. Mitchell had appeared by his attorney; there were two defendants in Court, and the record may be strictly true without his appearance, by himself or attorney. The judgment was improperly rendered against Charles Mitchell, and it is also erroneous as to the others; there being no discontinuance entered as to the defendant not served with process.

Judgment reversed and cause remanded.

---

### ROBERTS and BATTLE v. HENRY.

1. The statute making sheriffs liable for failing to return executions three days before Court, admits of a reasonable excuse for a failure so to return.
2. Chancery has jurisdiction to relieve a sheriff, where a judgment has been obtained against him for failing to return an execution three days before Court; a sufficient excuse being shewn for such failure, and also for the failure to make defence at law.

EZEKIEL HENRY, sheriff of Shelby county, filed his bill in equity, in Dallas Circuit Court, in December, 1824, against Roberts and Battle, copartners. He charged, that on a judgment obtained by Roberts and Battle in that Court, a *ca. sa.* issued, requiring him to take in his custody the de-

JULY 1880.

Roberts and  
Battle  
v.  
Henry.

---

endant in said judgment, *William Mulkey*, to satisfy to said plaintiffs \$839 40, debt and damages, besides costs; that this execution came to his hands, as sheriff of Shelby county, on the 22d September, 1824; that from that time till the return of said execution, Mulkey was not to be found in Shelby county, that he used due diligence to execute it. That four days previous to the commencement of the Court of Dallas county to which the writ was returnable, he placed the execution in the hands of one *Lawler*, a respectable man, who was going immediately to Cahawba, and said he would return it; that the distance was about seventy miles. He further charged, that he was not apprized that the law required that such process should be returned three days before the commencement of the term; that it was not the uniform practice; and that he did believe he would discharge his duty by returning it on the first day of the term; that his only inducement for not returning it sooner, was, that the mail from Shelby to Cahawba, owing to the circuitry of the route, would have taken a length of time, and he was desirous to retain it as long as he could, with a view to serve it on Mulkey, if possible, as he lived in the adjoining county of Bibb. That the writ was returned on the first day of the term; that Mulkey was notoriously insolvent which he alleged the defendants knew. The complainant further charged, that on the eleventh day of the return term of Dallas Circuit Court, Roberts and Battle, on motion to said Court, obtained judgment against him as sheriff, for \$855 02½ for a supposed negligence in failing to return the execution three days before the commencement of the term; that the only notice he received of said motion, was given him on the the 19th of October, 1824, which was the second day of the term of Dallas Court, and after the return of the execution; that he was at the time attending on Shelby Court, which was then in session, as sheriff of that county, at a distance of 85 or 90 miles from Cahawba. The prayer of the bill was, that said judgment be perpetually enjoined, and for general relief.

*Willis Roberts* answered, that James Battle, his former copartner, knew nothing of the matter; that he the respondent, had the sole management of it; that he believed the complainant had not used due diligence to execute the *ca. sa.* that he was informed that Mulkey was often in Shelby county, while the complainant had the execution in his possession, and within the knowledge of the complainant. That he did not know where the place of the permanent

JULY 1829.  
 Roberts and  
 Battle  
 v.  
 Henry.

residence of Mulkey was at that time. That he was informed and believed the execution was not returned till the second day of the term of Dallas Court, and after the notice had been sent; that the complainant had notice of the intended motion on the second day of the term of Dallas Court, and that the motion was made only on the eleventh day of the term; that the person who gave the notice at Shelby Court remained there till the adjournment of the Court, and afterwards travelled to Cahaba before the motion was made; and that therefore the complainant might, if he would, have made defence to the motion at law. The respondent further stated, that he believed said Mulkey had property in his own right, or had fraudulently conveyed it away; that he did not know, at the time of the issuance of the execution against Mulkey, that he was a resident of Bibb county, but was informed that a writ issued against him in Bibb about the time, was returned not found by the sheriff of Bibb county, who alleged as a reason, that Mulkey resided in Shelby county. He further answered, that he was ignorant of the negligent practice of sheriffs throughout the State, as alleged by complainant; but that the practice in Dallas he believed, was to return executions three days previous to the return term; and to the other allegations of the bill, as to the acts or inducements of the complainant, he answered that he was unadvised. The answer prayed, that the defendant might have the benefit thereof as a demurrer to the bill for want of equity, &c.

*Lawler*, a witness for the complainant, deposed, that seven days previous to the October term of Dallas Court, in 1824, he received the execution of Henry; that he told him he was going to Cahawba, and promised to return it to the Clerk; and that he did so on the first day of the term; that the distance was about seventy miles. Being asked on cross examination if he promised the complainant to deliver the *ca. sa.* to the Clerk of Dallas, three days before Court, or if he was requested to do so, he said, that he thought he did not make such promise, and did not recollect if he was so requested, or not.

*Moore*, another witness for complainant, proved, that he lived in Bibb county, three quarters of a mile from the Shelby line; that from June to October 1824, Mulkey resided part of the time at his house, and was during that time, backwards and forwards between his house and Mulberry Creek; that he was intimately acquainted with him; and that he knew him to be insolvent; that one hundred dol-

lars could not have been collected of him. On cross examination, being asked if Mulkey was not in Shelby county at any time in September or October, 1824, he said, that he saw him at a Camp Meeting on Thursday evening, about the second of September, and from then till the Monday following.

JULY 1829.

Roberts and  
Battle  
v.  
Henry.

*M' David*, a third witness for the complainant, deposed, that he lived with the complainant; that Mulkey was at Henry's house, but it was in the spring of 1824. That Henry was as industrious in executing process as it was necessary for sheriffs to be; that he saw Mulkey at the Camp Meeting, between the first and fifth of September, 1824, but saw him only on one day. On cross examination, he said, that Henry was absent a few days, a time or two, to go to Huntsville and to Cahawba, but did not recollect that he was absent in September or October, 1824; that he had a deputy to attend to business in his absence. He also said he did not know if exertions had been made to find Mulkey, or not.

At October term, 1825, the cause came on to be heard, on the bill, answer and depositions, before Judge Crenshaw; who decreed against the defendants, that the proceedings on their judgment should be perpetually enjoined, and that each party should pay his own costs.

Roberts and Battle assign for error, the decree; and allege that it should have been for them, and that the bill should have been dismissed as on demurrer, for want of equity.

H. G. PERRY, for the appellants. It is urged that the complainant had not legal notice of the motion; and that being in attendance at Shelby Court as sheriff, he could not attend to make his defence at law. The notice was served on Tuesday, the second day of the term of Dallas and Shelby Courts, both sitting at the same time, and the motion was not made till Friday, the eleventh day of Dallas Court; giving to the sheriff *ten* days notice of the motion, when the law required only *three* days notice to be given. Suppose the sheriff to have been engaged the whole week at Shelby Court, still he had six days after that time to travel to, and attend at Cahawba, a distance of only eighty miles. He does not shew that he made any attempt to go there, that he applied for time to do so, nor that he employed counsel, or did any act evincing a wish or disposition to defend said suit at law. The complainant also urges that he was ignorant of the law and practice in cases of this kind.

JULY 1822.

Roberts and  
Battle  
v.  
Henry.

If ignorance of the law does not excuse private person: much less can it a public officer, who in accepting the office, impliedly undertakes that he has the necessary skill, and that he will perform all its duties correctly. Neither is it an excuse for the sheriff that Mulkey was insolvent, for it was the very object of a *ca. sa.* to compel him to discover and yield up such property as was concealed and had been by him fraudulently conveyed away, and was out of view.

It is urged that the law is one of great rigor; but to this it may be answered, that the Legislature have ever since thought differently; and have in fact, since that time, made one days notice sufficient instead of three; and in fact no law can be considered too rigorous that compels an officer to perform ordinary duty; and this does nothing more. The grounds of accident and necessity cannot, in this case, afford to the sheriff a more safe reliance, as an excuse for not making his defence at law; for the record furnishes no facts from which any conclusions can be drawn, warranting relief on those grounds; and we need not look out of it for such reasons.

Another view of the case is, that by the decree rendered below, a positive statute of the State has been set at nought; and the rights of the appellants under it have been wholly disregarded. If the law is rigorous, it is not the business of a Court to abate its rigor. The law commanded, and wisely too, that the sheriff should return the execution three days before Court, absolutely;<sup>a</sup> he shews that he did not even try to do so; then by what rule of right can negligence of this kind be excused, and how can the penalty given by the statute, absolutely, for such default, be withheld? It is certainly important to be settled whether in any case, and what class of cases, a chancellor can control, disregard or repeal a positive statute;<sup>b</sup> Courts of law and Courts of equity, do not differ in the exposition of statutes.<sup>c</sup> In all the high handed measures of the English Chancery Courts, it is believed no analogous case can be found; and surely it will not be considered good policy here, to exceed the English Courts in their control over common law or statutory proceedings.

<sup>a</sup>Laws of Ala.  
319, 316.

<sup>b</sup>Fonblanques  
Equity p. 5.  
note e.

<sup>c</sup>Fonblanques  
Equity p. 23,  
24 n. g. & h.  
p. 26 n. j. and  
k. p. 38. n. l.

MARDIS, for the defendant in error.

By CHIEF JUSTICE LIPSCOMB. The complainant has shewn, by the answer and testimony, that he used a reasonable degree of diligence to have the *ca. sa.* returned

# SUPREME COURT OF ALABAMA.

47

three days before the session of the Court He has shewn that it was not in his power to attend Court, and resist the rule against him. He has, therefore, fair claims to the interposition of a Court of chancery. The statute requiring a sheriff to return executions three days before the next ensuing term, will admit of a reasonable excuse for failing to do so. Such a case we believe has been made out.

JULY 1880.  
Roberts and  
Battle  
v.  
Henry.

Decree affirmed.

Judge CRENSHAW not sitting.

## BRANNAN et al. v. OLIVER.

1. A purchase by an administrator at his own sale, by auction, is not void *per se*: But is *prima facie* valid, if no unfairness appears.
2. Nor will such a sale made in South Carolina be held void, though made without an order of Court; the laws of South Carolina not being produced, to shew that such order is necessary.

2a 47  
198 214  
198 216

DYONISIUS OLIVER, a minor, by his next friend and guardian *ad litem*, Gorge Bowie, filed his bill in equity in Monroe Circuit Court, in April; 1823, against Mary Ann Brannan, James D. Godbold, James Wade, and Edward Stedham. To this bill Mrs Brannan, Wade and Stedham, filed their answers.

By the bill, answers, exhibits and admissions of the parties, it appeared, that *Seaborn Oliver*, the father of Dyonisius, the complainant, resided in South Carolina, and died there intestate in 1813, leaving some negroes and other property; that he was but little indebted; that Dyonisius was his only child, and that the widow Mary Ann, and he, were entitled to his estate; that the said Mary Ann was, in 1814, regularly appointed, in South Carolina, administratrix of said estate; that she gave security, and was duly qualified. After administration was granted, the widow, as it appears, sold the slaves in controversy and which belonged to said estate, at public auction; but without the order of the Court of ordinary, and bought them herself. In 1817, she intermarried with James E. Brannan, who removed with her and the slaves to Monroe county Alabama. Brannan died in Monroe county, leaving judgments against him unsatisfied; and the said Mary Ann, his widow, administered also on his estate, and thus became re-possessed of said negroes as



JULY 1829.  
 Brannan et al.  
 v.  
 Oliver.

---

his administratrix; on those judgments in 1823, executions were issued, which were levied by the defendant Godbold, as sheriff, on the negroes; six in number. Four of the negroes were sold by the sheriff under those executions; Stedham bought three of them, and Wade one; for a fair price. The two others remained unsold in the hands of the sheriff, Godbold, who during the pendency of the suit, intermarried with Mrs Brannan, and they remained in their possession.

The complainant prayed that an account should be taken, and that two thirds of the residue of the estate should be paid him, being his proportion under the laws of South Carolina; and that the property should be decreed liable to satisfy his claim. It was admitted that Wade and Stedham were fair and innocent purchasers, for a full consideration, without notice; and the cause was submitted to the Court below to decide, if the purchasers were entitled to the property, or if it was liable to satisfy the complainant's demand.

At March term 1827, a final decree was rendered by the Chief Justice, establishing the distributive share of the complainant at \$1609 64, and to satisfy the same, ordering the two slaves remaining unsold, valued at \$800, to be delivered up; and that Wade should pay \$337 35, and Stedham \$472 29 their respective proportions, to the complainant, or that they should surrender the slaves; and that the defendants pay their respective shares of costs.

The defendants below, here assigned for error, a variety of matters in the proceedings there had, which are not noticed; as the points decided are fully stated in the opinion delivered in this Court.

BAGBY and LYON, and PARSONS and COOPER, for the appellants.

HITCHCOCK, for the appellee.

By JUDGE COLLIER. This cause presents for the decision of the Court the following questions: 1st. Can an administratrix become a purchaser at a sale, made by herself, of her intestate's estate? 2d. Will a sale made by an administratrix of her intestate's estate, in another state, without an order of Court, be considered regular, when it does not appear what is the law of that State?

An administrator is considered as a trustee for the benefit

JULY 1871.

Brannan et al.  
v.  
Oliver.

---

of the creditors and distributees of his intestate's estate; and, upon that hypothesis. I proceed to consider this case. The weight of English authority is against the right of the trustee to purchase the estate of his *cestui que trust*, and is predicated upon reasoning, the force of which must impress itself upon every mind. To permit a trustee to purchase, while he is enjoying the confidence of his *cestui que trust*, it is said, would be to license him to speculate, by abusing his situation. His duty obliges him to communicate all information, and to exert all the care and industry necessary to dispose of the estate as advantageously, for his *cestui que trust*, as if he were selling it for himself. His interest would sometimes thwart his duty, and the infirmity of human testimony would render it impracticable at all times, to prove its violation; hence the policy of the rule which divests him of a legal capability to purchase. In its correctness, when not carried to too great an extent, I most cordially acquiesce. I admit its wisdom, when applied to a purchase by an agent, at a sale by himself, of his principal's property, and to other purchasers under the same circumstances; but I must repudiate its application in the case I am considering.

The rule, with reference to a purchase by an administrator, has been frequently considered, both in the English and American Courts. By the former, it has been held to apply in all its strictness. The case of *Fox and Mackreth*, noticed in 2 Brown's Chancery Cases,<sup>a</sup> which seems to have engaged a full portion of the time of the Court of Chancery and the House of Lords, goes the entire length. The case of *Crow and Bullard*,<sup>b</sup> the cases in 5 Ves. jr.<sup>c</sup> and 6 Ves. jr.,<sup>d</sup> are to the same point. It is worthy of remark, that in only one of these cases, was the sale at auction.

The reasoning on which the rule is founded, inclines my mind to the opinion, that it does not extend to a purchase by an administrator, at a sale made by himself, of his intestate's estate; or, that if it extends to such purchase, it cannot be considered as applying, where the sale was made fairly. Let the case be examined by an application of this criterion to the facts on the record. Mary Ann Brannan, one of the appellants, and the mother of the appellee, administered on the estate of her husband, the father of the appellee, in South Carolina, where he died and before his death resided; and after the grant of the letters of administration, she sold the negroes mentioned in the appellee's bill, at public auction, without an order of the

<sup>a</sup> Page 400.

<sup>b</sup> 3 Brown's Ch. Cases, p. 117.

<sup>c</sup> Campbell v. Walker page 678. *Ex parte* Reynolds 707

<sup>d</sup> *Ex parte* Hughes 617. Lister v. Lister, p. 631.

JULY 1829.  
 Brannan et al.  
 v.  
 Oliver.

---

Court of ordinary, purchased them herself, for any thing appearing to the contrary, at a full price, and made a return of the sale to the proper Court.

These facts develop no unfairness in the purchase by the appellant, Mary Ann. The idea of unfairness is repelled, by the circumstance that the sale was not made privately, but openly, where all persons who wished had an opportunity of bidding. There is no allegation in the bill that the slaves were sold at an under price, and there is no proof that such was the fact. It is not alleged that the slaves were not sold pursuant to the laws of South Carolina; nor is there any thing on the record, from which such a conclusion can be legitimately deduced. If the laws of that State do not tolerate a sale made in the manner this was, it should have been shewn by proof, what formalities the law required there to make it legitimate. In the absence of proof upon this point, the Court can only look to the common law to aid it in its determination, and suppose that it has been adopted in South Carolina as the governing rule on this topic. What says that system of jurisprudence? That an administrator may sell, or otherwise dispose of his intestate's personal estate, as countable however, for a correct discharge of his duty in this particular, and for an honest application of the proceeds. This sale may be made privately without a license from Court. The law under which he receives his appointment confers the license, and makes him answerable for its abuse.<sup>a</sup> Had the appellant have designed to defraud the appellee, and by that means derive a benefit to herself by a purchase of the slaves of her intestate, would she not, under the circumstances, have acted differently? It cannot be true that she would have exposed the slaves for sale publicly at auction; or if she had, she would never have returned to the Court an account of the sale. Had she intended to act dishonestly, and disregarded that moral duty she owed to the creditors and distributees of her intestate's estate, as well as to her securities for a correct administration of the estate, it would not have been difficult to have acted otherwise. It is beyond the power of the human mind to fathom her intentions; but be they what they may, there is nothing in the record which manifests an unfairness of fact or intention; and it would be against a settled and charitable rule of law gratuitously to presume it.

Let us examine the reasoning of the rule which maintains the invalidity of a purchase by an agent or trustee, with a view to ascertain if it embraces the case we are consider-

<sup>a</sup>Toller's Ex-  
 ec'rs 133 240.

JULY 1829.

Brannan et al.  
v.  
Oliver.

---

ing. The great difficulty of discovering a disregard of the rights and interest of the *cestui que trust*, induced the determination of the Courts, that the trustee had no right to purchase, so long as his vicarial character continued. There, the only means, in almost every instance, to ascertain unfairness in the sale, was by such communication as the trustee might think proper to make; and it is unreasonable to suppose that he would make any disclosure, which would operate adversely to his interest; even when called on in equity, to answer on oath, if he was convinced that a knowledge of the facts was inclosed within his own bosom. How widely dissimilar is the case made out by the facts here? The administratrix sells at public auction the property of her intestate, where all who wish to purchase, have an opportunity of doing so; she returns an account of the sale to the Court, from which she receives her authority, and it is there recorded. If there was any unfairness in such a sale, the testimony of those who were present, (and some persons must be, or the sale cannot be public,) and the records of the Court, would, I may venture to say, in forty-nine fiftieths of the cases, disclose it; without depending alone upon the answer of the purchaser, in equity. Hence, I conclude, from the publicity of the transaction, that the rule when extended to a case like the present, is not sustained by just notions of policy; and that an administrator may purchase at a sale made at public auction, under legal authority, of his intestate's estate.

The authority furnished by the English and many of the American decisions, in favor of an extended application of the rule, cannot be received as conclusive or pertinent, in those states where administrators dispose of their intestate's estates by a public sale authorized by a special license from a Court of record, or where they make a return of such sale to the Court. These decisions are predicated upon a different state of fact. There the grant of administration is a license to them to perform whatever pertains to them in the character of administrator, and dispenses with a special authority. There the sale is good, though made privately; consequently, sales made by administrators under such circumstances, are less public, and the probability of detecting a fraud greatly diminished.

I understand the rule to be founded upon the idea, that the purchase is a fraud in law upon the rights of those interested in the estate. I consider it as most congenial with the condition of society and the character of human deal-

JULY 1839.  
*Brannan et al.*  
*v.*  
*Oliver.*

ings, to narrow the catalogue of legal frauds to as few as practicable, and to declare no act as fraudulent *per se*, where a wise and just policy does not imperiously demand it. Every lawyer who is not too much enamoured with his early notions of law, will admit that the benefits which result from an extension of the doctrine of constructive frauds bears no comparison with the injury it inflicts. I introduce this view, merely to shew, that the rule should not be held to extend to all cases of trust.

I will now notice some authority in favor of the right of the administrator to purchase. In *Lindsay v. Lindsay, administrator*,<sup>a</sup> the Court of Chancery in South Carolina determined in favor of the sale and purchase by the administrator. Another case in the same book, is to the same point.<sup>b</sup> In *M'Guire and wife, and others, v. M'Gowan and wife, administratrix*,<sup>c</sup> the same Court seem to treat the subject as if it was still an open question. Two of the Judges were in favor of the general authority to purchase; one of them, though he did not concur in the general authority of the administrator to purchase, held, that the trust being coupled with an interest in the particular case, he might be permitted to purchase; the other two Judges maintained the broad principle of incapacity. In *Perry and wife v. Dixon*,<sup>d</sup> the Judges seem to have been divided, as they were in the case of *M'Guire and wife, and others, v. M'Gowan and wife, administratrix*. The inference deducible from these decisions is, that an administrator, where he has an interest in the estate, may purchase; but where he has a mere naked trust, he cannot. The case we are considering comes within the rule as thus modified. The appellant, as the relict of her deceased husband, was entitled to one third of her husband's estate, and the appellee as sole heir and distributee, to the remaining two thirds. Without bending the strict rule further than it has been made to yield in the cases in 4 Dessausure, it was competent for the appellant to have purchased.

e 2 Hen. and  
 Murr. 245.

In *Anderson and Starke v. Fox and others*,<sup>e</sup> the question as to the right of an executor to purchase property exposed to sale by himself, was discussed. Judge Tucker in the opinion which he delivered, remarked, that he was no more prepared to say that as to such purchase the executor was a *mere trustee*. "If this Court," said he, "were to declare the law to be such in all cases, even where there was an undoubted deficiency of assets, and although the sale should have been made after due notice at public.

a 1 Dess. 150.

b Drayton's  
 Trust, Drayton  
 et al. 567.  
 c 4 Dess. 487.

d Ib. 504 note.

auction, and with all possible fairness, it would probably be the immediate parent of a thousand suits in chancery, to set aside such purchases, either in behalf of the legatees, distributees or creditors." Again; "The practice has been too general in this country, and has prevailed too long, to be drawn in question by analogy to the doctrines in *England* concerning trustees of lands or commissioners of bankrupts. For though executors and administrators are, to many purposes, considered as trustees in a Court of equity, they are not so in all cases."<sup>a</sup> Judge Roane deemed it unessential to a decision of the case to express an opinion upon the question; rather intimating however, that the English decisions did not consist with the usage and understanding which prevailed in Virginia upon the subject. The opinion of Judge Tucker, has ever since been considered as correctly ascertaining the law in Virginia.

The remark of Judge Tucker, as to the generality of the practice of executors and administrators in Virginia, purchasing at sales of the estates they represented, will apply with equal force to this country; and the injury consequent upon a decision in opposition to usage, would be alike incalculable. Under these circumstances, nothing but rules of law too inflexible to yield to considerations of general convenience, should superinduce such a determination. Where rights have matured under a general impression that they were sustained by law, such impression should not be lightly regarded. And in cases where the adjustment of the law is more important than in what way it be settled, it should receive a controlling influence.<sup>b</sup>

In 2 Carolina Law Repository<sup>c</sup> the general authority is maintained, with this restriction, that the personal representative shall be answerable to the creditors to the full value of the property. And in 2 Haywood,<sup>d</sup> it is held that an executor may purchase the property of his testator at a public sale by order of Court.

Having shewn that there is little danger of unfairness in the sale passing undetected where it is made publicly, I proceed to consider whether a just policy does not require a relaxation of the rule in such cases. It is certainly for the interest of the creditors and distributees, that the estate should yield, when sold, as large a sum as practicable; and as the surest means to effect that result, a fair and honorable competition should not only be tolerated, but encouraged. The widow or some near relative is most frequently the personal representative, and most solicitous to purchase

JULY 1820.

Brannan et al.  
v.  
Oliver.

2 Vesey. 482.

b Jones v. Logwood.  
1 Wash. 42.  
Colhou v. Snider.  
6 Blinn. 153.  
Waters et al. v. Stewart.  
N. Y. Cases in Error 47.  
c Page 49.

d Tomlinson's Exrs. v. De-tstitutions  
Exrs. p. 281.

## CASES DETERMINED IN THE

L. V. 1829.  
 Brannan et al.  
 v.  
 Oliver.

some particular portion of the intestate's estate; and if not permitted to purchase by openly bidding, would procure some one to become the ostensible purchaser, and acquire through him the ownership. If this can be done, and it is beyond the operation of human laws to restrain it, without inhibiting, to an impolitic extent, the transfer of property, why declare that the administrator shall not be permitted to purchase? The rule when extended to such a case can produce no good; since by a kind of tacit understanding, which the law cannot reach, he can acquire title through another. Surely, reason and good sense demand that he should be permitted to do that, directly, which he can do indirectly; and when too, if there is unfairness in the sale, detection is almost inevitable.

This course of reasoning has brought my mind to the conclusion, first: that the purchase by the administratrix is *prima facie* valid, because divested of all unfairness; second: that the sale is *prima facie* legal, because it does not appear what the law of South Carolina is. Without therefore expressing an opinion upon the other assignments of error, I am of opinion that the decree should be reversed, and the cause remanded, that an opportunity may be given to shew the law of South Carolina; and with me the Court concur.

Reversed and remanded \*

The CHIEF JUSTICE and Judge CRENSHAW, not sitting.

\* See the Cases of Gayle et al. v. Singleton. 1 Stewart p. 575.

## HOBBS v. BIBB.

1. Possession of personal property, remaining with the vendor, is presumptive evidence of ownership in him; but this presumption may be rebutted by proof.
2. Such possession is only presumptive evidence of fraud, but is not fraud *per se*.

THOMAS BIBB obtained a judgment in the county Court of Madison county, against John Estell and John Bradley, in February 1827, for \$2213 04; on which a *fi fa* issued the 26th of February 1827, which was levied on the next day on four negroes, besides other effects, as the property of John Estell. On the 28th of March the said slaves were

JULY 1829.

Hobbs  
v.  
Bibb.

---

claimed by John Hobbs, who made affidavit and gave bond according to statute. The proceedings were returned to the Circuit Court of Madison, for the trial of the right of property. At May term 1827, issue was joined, between the plaintiff in execution, and the claimant of the property; Bibb averring that the negroes were liable to the satisfaction of his execution as the property of John Estell, and Hobbs denying the same, and insisting they were his. The issue was tried by a jury, who found "that at the time of the levy, the negroes were the property of the firm of John and Joseph Estell; and that one undivided half thereof being John Estell's interest therein, was subject to the execution:" on which the Court rendered judgment, subjecting said undivided half to the satisfaction of said execution, and for the costs, against the claimant.

Hobbs took a bill of exceptions at the trial, by which it is shewn that his claim was under a purchase made by him from John and Joseph Estell. He proved that in August 1825, he lent J. and J. Estell \$2500, and took their note payable on demand for the repayment; that in November following, he purchased from them the four negroes levied on, and four others, and took a bill of sale for them and gave up the note for \$2500 in part payment, the whole price being \$2700. That at the time of the sale, John Estell hired the negroes from Hobbs, and continued in possession under said contract of hire until January 1827, when the hire, \$250 was paid, and Hobbs took possession of four of the negroes, and again hired the four now in dispute to said John Estell for the year 1827, for \$200, and took his note for the payment. It was proved that the Estell's were in partnership in all their transactions, and had been for several years; and that the negroes sold to Hobbs were partnership property, and sold to him to pay a partnership debt, the firm being indebted to him for other loans of money to more than the remaining amount of two hundred dollars, after deducting the note for \$2500. J. and J. Estell were in good credit, and transacted business extensively in Huntsville as auctioneers, brokers and commission merchants for several years; that in the fall and winter of 1824-5 they bought cotton largely, and sold it in New Orleans at considerable profit, and afterwards vested the proceeds, and extended their credit in the purchase of a large quantity of Cotton at New Orleans, which they shipped to Liverpool on speculation. At the time of borrowing the \$2500 from Hobbs, the fall of cotton in



JULY 1829.

Hobbs  
v.  
Bibb.

England was not known or anticipated, but before the sale of the negroes in November, such information of the fall of cotton in England had been received as to induce the Estell's to entertain general fears that they must fail, and under these apprehensions, they proposed to Hobbs to sell him the negroes for the cash he had loaned them. Their fears were realised, the loss on the cotton caused them to fail for a large amount. It was proved also, that the debt of Bibb was for money borrowed for and applied to the use of the firm. On this evidence the Court charged the jury, that although no fraud may have been intended by the parties, and although a fair price may have been actually paid by Hobbs, and although the contract of hire from Hobbs to Estell might be also *bona fide*, for a fair price and without intentional fraud; yet that the possession of the property remaining with Estell, was fraud of itself as to creditors, &c. and rendered the title of Hobbs inoperative as to the interest of John Estell; but as to the interest of Joseph Estell, as he was not a defendant in the execution, Hobbs's title would be good against the present plaintiff. The counsel for the claimant moved the Court to instruct the jury further, that if they believed the firm of J. and J. Estell was insolvent, that the judgment creditors of John Estell would have no right to levy on the property of the firm; but the Court refused so to charge, and on the contrary, instructed them that a creditor of any member of a firm had a right to levy on the effects thereof, to the extent of his debtors interest, if his execution was in the sheriff's hands before that of the creditors of the firm; and that insolvency made no difference. To all which Hobbs excepted.

The instructions given, and the refusal to give those requested, as shewn in the bill of exceptions, were, among other matters, assigned for error by Hobbs, the claimant, in this Court.

KELLY and HUTCHISON, for the appellant.

HOPKINS, for the defendant in error.

The cause was argued at July term 1828, and held under advisement till this term, when the opinion of the Court was delivered

By CHIEF JUSTICE LIPSCOMB. On the trial the Judge charged the jury, "That although the sale might

JULY 1829.

Hobbs  
v.  
Bibb.

a Page 66.

have been *bona fide*, and the hiring in good faith, and Hobbs actually have received the wages for which they were hired, yet, *as the possession had never been changed, it was void*, and the property was subject to the execution levied on it." The correctness of this charge we are now called on to consider. The main question presented is not a new one; it has given rise to much discussion, and a great contrariety of decision. It is whether the possession remaining with the vendor, after an absolute sale, is a fraud *per se*, or only *prima facie* evidence of fraud. Our statute is not materially different in its terms from the 13th Elizabeth: The adjudications of the English Courts may, therefore, be resorted to, and if they have been uniform in the construction of that statute, and correspond with the current of decisions on the same subject in this country, so as to have made a settled rule of law, it would be very impolitic and pernicious in its consequences to disturb it; however much we might be disposed to question its correctness, if it was *res integra*. Contracts, and the various transactions of mankind in business and trade, are supposed to be entered into, with a corresponding view to the law as it has been decided by the highest judicial tribunals of the country. A sudden subversion of a well established rule of law, might materially affect the relations of debtor and creditor, by dissolving liabilities entered into in the best faith. We will first inquire how far the decisions on this subject have been uniform in the English Courts. Those who maintain the affirmative of the proposition, insist, that the statute of Elizabeth is only in affirmation of the common law; that it is a well established principle of the common law, that possession remaining with the vendor is fraud *per se*. In Sheppard's Touchstone<sup>a</sup> the rule is laid down, that "If a debtor secretly make a general deed of his goods to one of his creditors, and continue in the use and occupation of the goods as his own, the deed is fraudulent and void against a subsequent judgment creditor, notwithstanding the deed was made on good consideration." There can be no doubt but that the ground of this rule is, that the secrecy of the transaction gave a false coloring to the circumstances and solvency of the vendor, and that such delusive appearances might well give a credit, that would otherwise be refused. But a previous creditor would not be in the same predicament; he could not be so much injured if the sale had been for a good consideration, because the debtor had a right to prefer one creditor to another. The

JULY 1839.

Hobbs  
v.  
Bibb.

---

a3 Coke 37.

reasonableness of this rule of the common law seems to be well founded. If, however, the broad ground that possession remaining with the vendor is fraud *per se*, be correct, it would be void both as to subsequent and prior creditors, whether they had been deluded by false appearances or not; this never has been ruled at common law, all the decisions going that length have been subsequent to the statute of 13th Elizabeth. It is worthy of remark that Twyne's case<sup>a</sup> so often referred to, was not a civil suit at common law for the ascertainment of a contested right between two individuals, but it was a proceeding *criminaliter*; an information at the instance of the attorney general for a fraud supposed to have been committed by Twyne, on the other creditors of Pierce, in setting up and publishing a fraudulent gift of the goods in question; and so far as the 13th Elizabeth sec. 5. could be brought to bear on the prosecution was for his benefit, he attempted to defend himself by shewing, that the conveyance from Pierce was protected by the statute, because it was founded on a good consideration. The sale however had been secret, and Pierce continued to exercise ownership of the property alledged to have been sold, such as shearing the sheep, selling some of them, and marking them in his own mark. The Court however did not lay hold of any one of these circumstances, as sufficient of itself to constitute fraud; but considered that they were all the livery of fraud, and when taken altogether made the sale a fraudulent one. When it is recollected that the case was at the instance of the attorney general, on the crown side of the Court, and how seldom the crown failed at that period in a prosecution, I think this case would not have been entitled to much weight, even if it had have laid down the broad doctrine contended for, which it does by no means do, so far from it that it only calls the possession with the vendor a badge of fraud.

There are many conveyances that would be held fraudulent under the bankrupt laws, that would be good under the 13th Elizabeth. Bankrupt laws are made for the benefit of trade, and operate on traders only, and not on the mass of the community. The trader carries on his business, and obtains a credit on the faith of his visible stock, and he is not permitted to make a secret transfer of his property; in fact such a transfer would be an act of bankruptcy, and the property so transferred could be recovered by the assignees of the bankrupt; a man variously indebted may convey all his property to a particular creditor whose

JULY 1829.

Hobbs  
v.  
Bibb.

debt covers its value without violating the 13th Elizabeth. But if he is a trader, such a conveyance will be against the policy of the bankrupt laws, and would be an act of bankruptcy, and void.<sup>a</sup>

In a case arising under the bankrupt act of the 21st James the 1st, Lord Mansfield, after the enumeration of many evidences of fraud, and among others the possession remaining with the vendor, uses this emphatic language: "nay, the not taking possession being *only evidence of fraud*, may be explained."<sup>b</sup> There are a great variety of cases,<sup>c</sup> under the bankrupt laws, sustaining the same doctrine; but not one of them laying down the broad rule, that possession remaining with the vendor is *per se* fraudulent. The case of *Edwards v. Harben*<sup>d</sup> is believed to be the first case decided under the statute of 13th Elizabeth, in which the ground was assumed by the Court, that on an absolute sale, the possession remaining with the vendor is fraud *per se*, and not mere *prima facie* evidence of fraud. This case has been followed by several respectable authorities; but it has been often questioned, and often declared not to be good authority. In *Kidd v. Rawlinson*,<sup>e</sup> Lord Eldon ruled, "that possession remaining with the vendor is only *prima facie* evidence of fraud." And long afterwards in the case of *Lady Arundel v. Phipps et al.*<sup>f</sup> he was much displeased that the rule he had laid down in *Kidd v. Rawlinson* should have been questioned, and uses this remarkably strong language: "the mere circumstance of the possession of the chattels, however familiar it may be to say, that it proves fraud, amounts to nothing more than that it is *prima facie* evidence of property in the man possessing, until a title, not fraudulent, is shewn, under which that possession has followed." Indeed nearly all the modern English decisions seem to question, if not wholly reject the strong rule laid down in *Edwards v. Harben*. In the case of *Stewart v. Lomb*,<sup>g</sup> Chief Justice Dallas says that it has been dissented from often. Park, Justice, admits that doubts have arisen as to the extent of the doctrine of *Edwards v. Harben*, Burrough and Richardson, Justices, concur that actual possession is not in all cases necessary to the transfer of chattels, and acknowledge the soundness of the rule in *Kidd v. Rawlinson*, and *Watkins v. Birch*.<sup>h</sup> It appears clear from these cases, that if the rule in *Edwards v. Harben* has not been wholly subverted, it has been much shaken, and is far from being acquiesced in as good authority.

The Supreme Court of the United States, in the case of

a Roberts on  
Frauds 492.  
i Burr. 407.  
Douglas 262.

b 1 Burr. 484.  
c 1 Ves. 343.  
1 Atk. 165.

d 2 Term R. 587

e 2 Bos. and  
Pnil. 59.

f 10 Ves. 145

g 1 Brod. and  
Bing. 506.

h 4 Taunt. 823.

JULY 1829.

Hobbs  
v.  
Bibb.

a 1 Cran. 309.

b 19 John. 221.  
c 3 Gowen 166.

*Hamilton v. Russell*,<sup>a</sup> acknowledged the authority of *Edwards v. Harben*, and that decision is considered as settling the law in the Federal Courts. The same rule obtains in Virginia, S. Carolina, Tennessee, Kentucky, Pennsylvania, and N. Jersey. In N. York, possession remaining with the vendor is ruled to be only *prima facie* evidence of fraud. — [See *Ludlow v. Hurd*,<sup>b</sup> and *Bissell v. Hopkins*,]<sup>c</sup> In the last case the point was argued with great ability, and the reporter has with great industry and research, collected all the cases of exception to *Harben v. Edwards*. The same doctrine is sustained in Massachusetts, N. Hampshire, and N. Carolina. From all of which it appears that the question is not well settled in this country, perhaps more unsettled than in England.

d 2 Kent's  
Comp. 404, 410.

I have said that if the statute had received a settled construction, that it ought not to be lightly set aside; but as I have shewn, so far from uniformity, there has been a great diversity of decision; so much so, that Chancellor Kent calls it "a very vexatious question," and says that the history and diversity of decision on this subject, form a curious and instructive portion of our jurisprudence.<sup>d</sup> Such then being the unsettled state of judicial decision on this subject, we are left to the free and unbiased construction of the statute, uninfluenced and unfettered by previous adjudications. That portion of the statute, material to the investigation of the question under consideration, is as follows: "That every gift, grant, or conveyance of lands, tenements, or hereditaments, goods or chattels, or of any rent, common or profit out of the same, by writing or otherwise, and every bond, suit, judgment, or execution, had or made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase, &c. shall be void, &c."

On reading this statute it does seem that the unsophisticated mind would be much at a loss to imagine, by what possible artificial rule of construction invented by the ingenuity of man, a contract entered into with good faith, and for a fair and valuable consideration, could be brought within its proscriptive influence. He would at once say that the statute forbids no honest transaction, it only proscribes fraud. The intention of the parties to the contract is not, nor can it, for a moment, be called a question of law; it is clearly one of fact to be determined by the jury.

JULY 1829.

Hobbs  
v.  
Bibb.

"How, then, can the Court assume on itself to say that if the possession remains with the vendor, it is conclusive evidence of fraudulent intent, not to be controverted by any testimony to shew the fairness of the transaction? It is contrary to the genius of our government, and against express legislative enactment, that Courts should encroach on the peculiar privileges of the jury, in determining on the facts of a case. A long course of practice in England has sanctioned such encroachments in her Courts. It is not unusual for the Judges there to arrest a cause from the jury, by declaring that the evidence offered is not sufficient to prove the facts averred and put in issue by the plea, and either direct a nonsuit, or order a subservient jury in the box to return a verdict, not on their own conviction of the truth, but according to the wishes of the Judge. Such assumptions of authority render the boasted trial by jury a mere farce. This is an evil that has, to some extent, crept into the judicial tribunals of our own country, from too close an adherence to English authority. Its influence has been irresistible in some of the States; and I can but think, with all due respect for the supreme judiciary of the United States, that it has no where been more perceptible than in *Hamilton v. Russell*. That decision is confessedly based on *Edwards v. Harben*, a foundation so frail that if it has not been overruled, it has at least been considered very questionable authority, in the very Courts where it was pronounced. This case, so often questioned, and so often departed from, is the foundation of all the State adjudications that support the same doctrine. In the case under consideration, it does not appear that the plaintiff in execution had been injured by the property remaining in the possession of Estell, nor does it appear that the debt had been contracted, and credit gained on the faith of that possession. If Hobbs had permitted his property to remain in the possession of Estell, without using some means to give publicity to his right, and an innocent creditor had been imposed on by the false colours it enabled Estell to hold out, his property in such case might have been subjected to the payment of another's debt, on the principles of the common law, and the soundest rules of morality.

The charge of the Court was so broad, that it would not even have admitted evidence that Bibb knew of the sale to Hobbs. It rests on the isolated fact, that possession remaining with the vendor, Estell, made the sale void. It should have been in the language of Lord Eldon, that Estell being

JULY 1880.

Hobbs  
v.  
Bibb.

in possession, the law would presume that he was the owner, but that this presumption would give way to proof that he was not. The proof of the sale and subsequent hiring should have gone to the jury to determine whether the sale was made with a fraudulent intent or not. Courts can never exercise too much vigilance and zeal, in administering the laws for the preventing of fraud. But that zeal must not seduce them from their proper sphere of action. If sound policy requires that he who has once owned a chattel shall never have possession of it after he has sold it, by hire, loan or otherwise, it is a proper subject for the attention of another branch of the government. Courts should never undertake to distort the words of a statute, to effect any object, however salutary. If they do so, Legislation will be at an end, in the constitutional way, and the whole legislative functions will be swallowed up by the judiciary. The legislative and judicial departments have distinct duties to perform. The Legislature can alone make the law, and it is the exclusive privilege of the judiciary to expound it. Let us then not trespass on the rights and privileges of a co-ordinate department; but content ourselves with expounding what the law is, and not what sound policy requires that it should be.

Judgment reversed and cause remanded.

Judge SAFFOLD having presided below, did not sit.

Judge TAYLOR not sitting.

---

\* See the case of Ayres v. Moore, decided in this Court at January Term, 1880; and the case of Richards v. Hazard, at July Term, 1881.

JULY 1829.

Ellis  
v.  
Bibb.

## ELLIS v BIBB.

In July 1819, P. as principal, with E. as security, gave their note payable in six months to B. for \$3000, to bear interest at five per cent a month. In March, 1821, B. without the consent of E. at the time, entered into a new contract with P. who secured the payment of \$3500 in one year and \$4000 in two years, by a deed of trust on twelve negroes, and B. agreed to remit the remainder on said sums being paid. P. absconded with the negroes. In January 1822, E. under the influence of alarm and mistake as to his legal rights, consented to give B. his notes for \$6,600, and received an assignment of the original note and deed of trust: both believing that five per cent a month was recoverable on the original note till paid. E. on those notes paid \$4,400 and was notified by his principal not to pay more than was lawfully due on the original note, at his peril. It was held.

- 1st. That B. on the original note was only entitled to interest at five per cent per month till its maturity, and at eight per cent per annum afterwards.
2. That the extension of time given, released the security.
3. That the notes of E. for \$6,600, were not void for usury.
4. That E. being a security, was entitled to relief in chancery against all but the balance of the original debt, computing interest at five per cent a month till due, and eight per cent per annum afterwards.

RICHARD ELLIS, in January 1826, filed in Franklin Circuit Court a bill in chancery against Thomas Bibb, for a discovery and relief, and to enjoin a judgment at law which Bibb had recovered against him. The cause at April term 1827, was by consent, submitted for a final decree on the bill, with the several accompanying exhibits, and the answer; and a decree was rendered by the presiding Judge, dissolving the injunction previously granted, and dismissing the complainant's bill.

*Ellis*, assigns in this Court for error, that the decree was improper; 1st. Because he was discharged from liability as security of Pettus, by the enlargement of time given for payment without his knowledge or consent, and therefore that the note sued on was without consideration: 2d. Because the several notes given by the complainant, amount to more than was due from Pettus to Bibb, and therefore were void for usury; 3d. Because as more than principal and legal interest had been paid, the injunction should have been perpetuated.

The principal and material facts of the cause appear and are stated in the opinion delivered.

By JUDGE SAFFOLD. By the bill, exhibits and answer, it appears that William Pettus, in July 1819, and while the statutory restraints on usury stood repealed, according to the provisions of the act of 1818, executed his note to the defendant for \$3,000, payable six months after date, to carry interest at the rate of *five per cent a month*;



JULY 1829.

Ellis  
v.  
Bibb.

F. Pettus and complainant also signed the note, as *securities* of said William. The consideration of the note was *Mississippi Stock*, which had been purchased several years previously at a discount of about *fifty per cent*, but which at the date of the contract between these parties was worth its nominal amount, being receivable in payment for public lands as so much cash.

Pettus, the principal, at the time of executing the note, was possessed of considerable property, and his circumstances were reputed good. Sometime after the debt fell due, the defendant instituted suit against the principal, but before service of process on complainant, in March 1821, he entered into a new contract with W. Pettus, by which it was stipulated and agreed that certain negroes therein described, (about twelve in number,) were conveyed and transferred to said defendant and Daniel Coleman, to secure the payment of the debt and interest aforesaid: and on the condition, that if Pettus should pay to the defendant \$3,500, within twelve months from the date thereof, and \$4,000 within two years, in good current bank notes, the defendant would accept the same, and remit the residue that might be due, and the deed should become void; but if Pettus should fail to make payment as aforesaid, said Coleman as trustee should, upon the first failure to pay, take possession of the negroes and sell them, or so many thereof as should be sufficient to pay said note and the interest then due thereon, at public auction, &c. The defendant also as a consequence of this contract, dismissed his suit against Pettus.

It does not appear that complainant was consulted in relation to this contract at the time it was entered into, or at any time previously, or that he had ever consented to any extension of the term of credit to the principal. The complainant charges that he was then absent in a remote part of the state, without the means of knowing, much less of consenting to the same; but that afterwards at Cahawba, the defendant informed him of the arrangement he had made, and asked complainant if he was satisfied with it; to which complainant agreed, and said he was glad of it. He further states that he was induced to make this reply from a conviction entertained at the time, and since, that he was thereby discharged from all liability as security to the note; in as much as defendant had of his own accord taken other security, extended the term of credit, and dismissed his suit; nor would he ever have entered into a contract or compromise to the contrary, but for the influence of counsel he

JULY 1839.

Ellis  
v.  
Bibb.

afterwards received, and the alarm excited in his mind from the rapid accumulation of interest, in addition to the amount of the original debt. The bill also charges various importunities and advice intruded upon him by the counsel of the defendant, urging him to the compromise, after his discharge as aforesaid; in consequence of which, together with the advice of an attorney consulted by him, and in whose opinion he had great confidence, he was induced to accede to the terms proposed, and executed his several notes to the defendant, for sums making together \$6,600, which was 800 or 1,000 dollars less than he at first insisted on as being due him on his original note. It is further stated, that pursuant to the terms of the compromise, said original note, and the deed of trust from Pettus, were by the defendant assigned to the complainant, without recourse on the former; but which were believed to be of little or no value, as Pettus had fled to one of the Mexican states, and taken with him all the property conveyed by the deed of trust; and that the absconding of the principal debtor as aforesaid, together with the co-security, was the chief cause of the defendant's extraordinary exertions and ingenuity to get the complainant re-bound for the payment of the debt, and of the alarm and apprehensions of the latter for his own safety; whereby he was rendered more accessible to the influence of erroneous counsels. The complainant also tenders a redelivery of the note and deed of trust as described, should the Court so direct, as the terms on which he can be relieved from this contract. He further states he has paid defendant on his said notes exceeding \$4,400, and exhibits the receipts; that defendant has since prosecuted suits on the residue of his notes, and recovered judgments against him for the balance promised; which exceeds, by several thousand dollars, the amount which he could ever have recovered from Pettus, or which complainant can ever recover from him, either in law or equity, more especially as he has absconded. The bill contains also a statement of chancery proceedings, by Pettus, against complainant and defendant; and a notice from Pettus to complainant, that if he made payment to defendant, it would be at his peril; with other matters, deemed immaterial to the merits; and concludes with a prayer for a perpetual injunction of the judgments at law, and such other relief as justice and equity may entitle him to.

I omit to notice the asperity of the bill and answer, with which the record is unnecessarily encumbered, giving

JULY 1839.

Ellis  
v.  
Bibb.

only the substance of the material allegations of the bill, and the admissions of the answer, express or implied.

The answer denies knowledge as to the fact whether the complainant was originally bound in the capacity of security only, or otherwise; but the deed of trust exhibited by the complainant, to which the defendant is a party, and which in his answer he admits to be valid, shews that complainant was a *security* merely. Defendant admits he made the new contract with Pettus as charged, but says "he does not admit that it was without the knowledge or consent of the complainant; on the contrary he believes that it was with the full knowledge, privity and consent of the complainant; as he afterwards expressed himself to this defendant, and to others, well satisfied with the arrangement and security obtained; and also stated it would lessen his responsibility, and be a security to him as well as to the defendant, from said Pettus." He denies he ever considered the complainant released from his liability on the original note; but says, when he heard that W. & F. Pettus had absconded with all the property contained in the deed of trust, he became uneasy about said debt; and was anxious to have it better secured than it then was by the liability of the complainant alone; and with the aid of counsel, and by extending the time of payment, and abating part of the debt, he succeeded in making an arrangement with the complainant, by which he obtained his notes with personal security, &c. He admits payments made in part satisfaction of the notes, to about the amount charged in the bill. In answer to the charge, that the complainant, under the circumstances described, contracted his latter liability under a mistaken impression as to his legal responsibility, as well with reference to the amount which was recoverable on the original note, as to the question whether he was not entirely discharged by means of the new contract between Pettus and defendant, the latter responds in substance, that he cannot deny the complainant's ignorance as charged.

With regard to the essential fact, whether complainant consented to the modification of the contract with his principal, or had at the time knowledge of it, the remark is due, that in connexion with the averment of the answer that the defendant believed the complainant had full knowledge of the arrangement, and that it was made with his privity and consent, he adds the reasons for this belief; which are, that the complainant afterwards expressed him-

JULY 1829.

Ellis  
v.  
Bibb.

---

self well satisfied with the arrangement and security obtained, and also said it would lessen his responsibility, and be a security to him as well as the defendant, from Pettus. The grounds of the belief do not sustain the presumption of the complainant's privity and consent; they only prove that at a subsequent period he was not dissatisfied with what had been done, and thought his situation had been rendered more secure thereby. His absence to a distant part of the state is not denied, and the admission that the communication was made to him afterwards, sufficiently implies that it was not done before. At any rate, as complainant was not consulted on the arrangement, nor gave his consent at the time, or previous to its being entered into, be the other facts as they may, they can have no stronger operation on him than his still later contract of compromise, the effect of which remains to be considered.

On this state of facts, the Circuit Court having dissolved the injunction and dismissed the bill with costs, their decree is assigned as the cause of error.

The record and argument present the following questions: 1. In what amount were the parties to the original note bound in respect to the stipulated premium? 2. Was the complainant discharged by means of the new contract between defendant and Pettus, in which other security was taken and the time of credit extended? 3. If once discharged, was the complainant's subsequent undertaking valid against him in reference to his mistake of law, and to what extent was it founded on a sufficient consideration? 4. Was the contract of compromise usurious? 5. Can chancery entertain jurisdiction and afford relief?

1. On the first point, it is sufficient to remark that the principle adopted at the June term 1824, of this Court, in what were called the "Penalty questions," and repeatedly recognized since, has fixed a standard by which the true amount legally due, on similar contracts, is to be computed; and with which I continue to feel entire satisfaction. The rule was, that the exorbitant rate of premium as stipulated, should be allowed until the maturity of the note, where, as in this case, it had been absolutely promised from the date of the contract; but that at the expiration of the agreed term of creditor forbearance, when an extinguishment of the debt was contemplated by the contract, and the debtor became subject to the coercion of the law, with the costs of suit; and when, as forbearance was no longer agreed, the premium could not retain the protection of the

JULY 1830.

Ellis  
v  
Bibb.

deleterious provisions of the statute of 1818, entitled "An act to regulate the rate of interest," that then the conventional premium ceased, and the common rate of interest, as established by law, should be subsequently allowed. And as to the specific consideration, whether *cash* actually loaned, a pre-existing debt, *Mississippi Stock*, or any other valuable and sufficient consideration, I hold to be perfectly immaterial; as was my opinion in the decisions referred to, and which has been strengthened and confirmed by subsequent examination and reflection.

2. The next question relates to the effect of the new contract between the defendant and principal debtor. The assumption of the fact is conceived to the well authorized from the bill and answer, that the other security was taken, and the term of credit extended, by instalments of one and two years, without the knowledge or consent of the complainant, who was bound only as security.

The doctrine is believed to be well established on principle and authority, that debtors, especially securities, can only be bound by the terms of their contracts, whether express or implied; that the responsibility of a security cannot be materially varied without his privity and consent; his safety may especially depend on the limited term of credit to which he has assented. If, when the debt falls due, the creditor be disposed to grant passive indulgence, should the security believe his principal in failing circumstances, and that delay in prosecuting the debt would tend to his prejudice, the law has provided means to which he can resort for greater safety; but if the creditor has surrendered the dominion of his debt by extending the term of credit, the security is thereby deprived of the means of relief, and the debtor, during the extended term, is placed beyond the reach of either creditor or security.

The principle that such circumstances will operate as a discharge of the security is maintained by Lord Loughborough, in *Kees v. Berrington*.<sup>a</sup> In that case, he said such interference with the contract constituted a breach of the security's obligation in honor and conscience, as well as in point of law; and refused to inquire what injury might result to the security, for that, he said, would lead to a vast variety of speculations on which no sound principle could be built. In the case of *Rathbone v. Warren*,<sup>b</sup> the authority of the above stated case was acknowledged, and a similar decision made. The circumstances were a little dissimilar, but the principle is the same. The relief sought

<sup>a</sup> 2 Vesey Jr. 543.

<sup>b</sup> 10 John. 587.

JULY 1839.

Ellis  
v.  
Bibb.

for was in favor of the bail, where the creditor, having obtained judgment, contracted with the defendant, by a written agreement, that he would not issue execution against him for the purpose of fixing the bail until after a certain day; there, actual injury would have resulted to the security, in consequence of the defendant's going to sea before the day on which execution could issue; but the decision did not rest alone on the actual injury; it recognized the broad principle, that if an obligee does any act to the injury of the surety, or varies the terms of the obligation, or enlarges the time of performance, without his consent, the surety will be discharged. In that case, it was contended in argument, that the law does not extend the same degree of protection to bail that it does to securities; the converse of the proposition has perhaps never been contended for; the Court, however, held that there was no difference.

In the case of *Comegys & Pershouse v. Cox & Harris*,<sup>a</sup> this Court acted on the same rule, and discharged a security under circumstances less favorable to relief than the present case. This doctrine is believed to be so well established at the present day, as to render a particular review of the various adjudications upon it unnecessary. And from the facts as presented in this case, injury, if material, may well be supposed to have resulted from this extension of credit, as the debtor, during the time, absconded with his property. Whether he would otherwise have risked the attempt, or could have succeeded if he had, is equally uncertain. But it is, at most, sufficient that he eluded justice, under a state of the contract entirely favorable to the effort, and to which the security had not given his consent.

<sup>a</sup> 1 Stewart's  
R. 262.

3. I am next to examine the validity or equitable effect of the complainant's compromise, after he had been discharged from liability on the former contract by reason of the unauthorized alteration of its terms by the payee. The attitude in which the complainant stood, was peculiar in the extreme. The extension of the term of credit, without his knowledge or consent, had absolved him from all legal obligation to pay any thing. If the alteration of the terms of the contract had a necessary tendency to increase his liability, he was also discharged from all the moral obligation. But I think it a fair presumption, that at the time of entering into the arrangement, the defendant supposed its tendency would be to make the debt more secure, at least against the principal; and that the complainant afterwards, qut previous to the absconding, on being informed what

JULY 1839.

Ellis  
v.  
Bibb.

---

had been done, entertained the same opinion. This conclusion is warranted from the language of the bill and answer on this branch of the case. Hence I am of opinion that a sufficient moral obligation existed in this case, to sustain a subsequent promise to pay the true amount of the defendant's debt. It is also worthy of remark, that this original debt had been contracted under a statute *sui generis*, and which had not at that time received the same judicial exposition that has since been given it, so that the amount due depended on principles of construction which were novel and difficult; and which have since been so established as to allow on contracts of the kind much less than at that time had been allowed in private settlements, or held to be due by the decisions of the Circuit Courts.

Under these circumstances, and the advice and persuasions of counsel employed by himself and the defendant, he became fearful of his responsibility, contrary to what he says were his former impressions as to the effect of the alteration of the contract; and this influence, together with the consideration of the assignment of the original note and deed of trust, induced him to give his notes for the sum mentioned, which was less than the defendant contended was due on the original contract. The probable value of the note and deed of trust deserves slight notice, as they contribute to the singularity of the transaction. That the complainant could never have sustained an action on the note against any one after it was thus discharged, is believed to be true, as contended in argument. The discharge of the debt by giving notes for it, and the assignment to one of the payors, was, in legal acceptance, a satisfaction of the original note.<sup>a</sup> Nor was the deed of trust an instrument legally assignable, especially after the debt which it was intended to secure had been satisfied; even by the security. It could convey no legal title to the property to the complainant. His interest derivable from these assignments, could amount to nothing more than an equitable demand against Pettus, to be prosecuted, if at all, in a foreign government.

But it is contended the complainant entered into this contract with a full knowledge of all the facts; that it was in the nature of a compromise of a doubtful right, fairly stipulated between the parties; that if there was any hardship, disappointment or mistake as to the inducement or consideration of the compromise, it proceeded from ignorance of the law, and as each one is charged with a knowl-

<sup>a</sup> Tindall v.  
Bright.  
Minor's Ala.  
Rep. 103.

JULY 1820.

Ellis  
v.  
Bibb.

edge of the law, no relief can be afforded on that ground. If the general rule to that effect, the existence of which I admit, be applied to this feature of the case, yet it must be remembered, as a rule of law equally established, that if any one, either with or without a correct knowledge of the law, enter into an executory contract, without consideration; or, if the consideration fail, wholly or partially, defence at law may be made, or relief in Chancery may be had, according to the circumstances, and as the justice and equity of the case may require. The general proposition is also true, that if property be contracted at a fixed price, without warranty or deceit in the vendor, no ordinary inadequacy of price can entitle the vendee to relief; yet it may be so gross and unconscientious, as to exhibit internal evidence of unfairness, and vary the principle. And in cases where property has been sold, the chief objection to such relief is, that the owner of the property has a right to fix his price at discretion, and retain the ownership until another is willing to give it; and when this is promised, and the contract executed in *good faith*, justice as well as law, forbids a reduction of the price according to the estimate of witnesses, or of any tribunal.

This case is so far different, that the object of the contract was to secure the payment of a prior debt, which the creditor demanded, and threatened to prosecute against one who had been bound merely as security, and afterwards discharged by the act of the payee. The amount of the debt to be secured has been ascertained, by subsequent judicial constructions in similar cases, to have been more than \$2,000 less than the sum promised. This reduced amount was the extent of the defendant's legal demand on the old note. It is all the complainant could recover of Pettus, under the most favorable circumstances; and had this contract not been made, the defendant would have retained only the note and deed on Pettus, instead of the complainant's renewed engagement.—Hence it follows, that when the complainant shall have paid the amount that was legally due on the original note, he will have paid, and the defendant will have received, all that justice or equity demands.

But the effect of the mistake in law, as to the complainant's prior liability, under the influence of which he was induced to enter into this compromise, was discussed in the argument, and deserves a slight notice. I retain the opinion, which I have long held, that as a general rule,



JULY 1829-

Ellis  
v.  
Bibb.

relief cannot be had against mistakes in law, but that the rule admits of exceptions. Such was my opinion in the decision of January 1827, in a second class of cases involving the "Penalty questions;" but for reasons I then expressed, I considered those cases as not furnishing exceptions to the rule. I am free to admit that the cases are rare, and that the circumstances should be peculiar and extreme, to authorize the interference. But an unqualified denial of the competency of chancery to relieve against *mistakes in law, under any circumstances*; and the idea on which it rests, that the responsibility is too great; the fact unsusceptible of proof; and the power of distinguishing cases of sufficient equity, from others, too delicate or difficult, is, I conceive, degrading to the judiciary of any government. Cases often occur in which it is impossible to separate the naked fact of mistake from other circumstances, either strengthening or diminishing the claim to relief; and the decisions have frequently been based mainly on the latter, allowing the mistake more or less influence in the decree. In other cases it may as often happen that the common presumption that the law was understood, cannot be sufficiently disproven; or that by varying the terms of the contract, the rights of indifferent persons may be affected, or that the equity on which the claim to relief is founded, may not be sufficient to authorize it. In cases of this kind, and many others, the maxim *ignorantia juris non excusat*, applies with great force and equal propriety. Some tribunals of respectable authority have adopted the maxim without qualification. But others of equal or higher authority, and I think with better reason, have admitted exceptions to the rule, in peculiar cases as reported; and the imagination can easily suggest other cases equally strong.

The highest recent adjudications on this question have been in the case of *Hunt v. Rousmanier's administrator*, which was twice before the Supreme Court of the United States.<sup>a</sup> That case is relied on in this, by the counsel on each side. The question was whether chancery would sustain a power of attorney, and set it up as a mortgage or deed of trust, after it had failed of its object by the death of the maker, and disappointed the intention of the parties to it. The circumstances were, that the intestate being debtor to Hunt, for money lent, and having, as the terms of obtaining the loan, agreed to prefer him to other creditors, and give him any kind of *lien* on his vessels that might be necessary to effect the object, they consulted an attorney, who advised

<sup>a</sup>8 Wheat. 174.  
1 Peters 1.

JULY 1829.

Ellis  
v.  
Bibb.

an irrevocable power of attorney, containing authority to sell the vessels, and pay the debt; and drew one accordingly, which he said would answer the purpose as well as any other instrument, and which was executed and accepted. On the first adjudication, C. J. Marshall, in delivering the opinion of the Court, examined the doctrine of mistakes in law at considerable length, and reviewed several decisions of other Courts upon it. He said, "in general, the mistakes against which a Court of equity relieves, are *mistakes in fact*. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact; yet some of them bear a considerable analogy to the one under consideration;" and which he regarded as a mistake *in law*. Among the cases relievable, he said, "were that class in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who in his lifetime had received an advance of the money, and whose representatives were discharged at law. "He mentions two decisions, *Simpson v. Vaughan*,<sup>a</sup> and *Underhill v. Howard*,<sup>b</sup> in which this kind of relief has been granted; but says the Judges seem to have placed them on mistake in fact, arising from the presumed ignorance of the draftsman; and that it was not until the case of *Sumner v. Powell*,<sup>c</sup> that any thing was said in the decision favorable to relief on the ground of mistake in law. In that case the Court refused its aid, because there was no equity antecedent to the obligation; but intimated, that sufficient equity could have obtained the relief. The Chief Justice further remarks, "that the course of the Court seems to be uniform, to presume a mistake in point of fact in every case where a joint obligation has been given, and a benefit has been received by the deceased obligor. No proof of actual mistake is required. The existence of an antecedent equity is sufficient;" and that "the facts stated in some of the cases in which these decisions have been made, would rather conduce to the opinion that the bond was made joint, from ignorance of the legal consequences of a joint obligation, than from any mistake in fact." He also notices the old case, of *Landsdowne v. Landsdowne*,<sup>d</sup> in which relief was given against a mistake in law; and says, as an authority on this point, it cannot be entirely disregarded. He furnishes the high authority of that Court, that this important principle yet remains in an essential degree unsettled. He observes, "although we do not find the naked principle, that relief may be granted on account of ignorance of

<sup>a</sup> 2 Atk. 33.  
<sup>b</sup> 10 Ves. 209.  
227.

<sup>c</sup> 2 Meriv. 36.

<sup>d</sup> Reported in  
Mosely.

JULY 1828.

Ellis  
v.  
Bibb.

the law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." Nor did that Court evince any terror at the idea of such competency. The opinion concludes thus: "we find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say, that a Court of equity is incapable of affording relief."

On this point, the decree of the Circuit Court, denying relief, was reversed; but because the rights, of other creditors were involved, and the decree had been rendered on demurrer to the bill, the cause was remanded that the bill might be answered, and the equity of the claim ascertained.

On the latter adjudication of the same cause, the defendant having answered the bill, the state of the case was materially different; so that the effect of mistakes was not particularly considered. The Court remarked, that "the question then was, ought the Court to grant the relief which was asked for, upon the ground of mistake arising from any ignorance of the law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character." This, as a general proposition, corresponds precisely with my idea of the true doctrine.

No dissatisfaction was intimated as to the principles of the former decision of the same Court; but as many additional facts were shewn on the second trial, and it appeared that the intestate's estate was insolvent to a large amount, and under the failure of the power of attorney, rights had legally vested in the creditors generally; and as it also appeared that the power of attorney was the kind of instrument, and in the form the parties had ultimately agreed upon, and intended it should be, though its effect proved different from a subsequent event not anticipated; and because on a full view of the case, the complainant's equity was at least balanced, the Court refused relief.

I think it is sufficiently shewn, that on the question as to the effect of mistakes in law, exceptions are admitted to the general rule, in a few cases, attended with peculiar circumstances. In determining these exceptions, the chancellor can only be expected to exercise the same virtuous discrimination, sound legal judgment, and equitable discretion,

which are due from him on various other occasions, which qualify him for his office, and are necessarily connected with his high responsibilities.

JULY 1892.

Ellis  
v.  
Bibb.

From the facts of the case before us, and from the intrinsic nature of the transaction, no doubt can be entertained but that a two-fold mistake in law had a real existence; and that under its influence, the complainant was induced to enter into this contract, which he was not legally or morally bound to do, and otherwise would not have done. The extent of the moral obligation is already shewn to have been far short of the promise. And I think it has also been shewn from the facts of the case, that it is otherwise oppressive, and that one of greater peculiarity can hardly be imagined. Could even the complainant's mistake relative to the amount recoverable on the original note, and his promise to pay a larger sum on account of it, be considered as a legitimate subject for the compromise of a doubtful right, because the law governing the debt had not then been otherwise expounded, as was insisted on in argument, still the other mistake as respects his entire legal discharge, must stand on a different principle; for the law on this point is believed to have been uniform, and long understood in the same way. And though the simple fact of a mistake in law will not generally entitle a party to relief against it, I presume it has seldom been denied that such mistake, when established and connected with other equitable circumstances, does not strengthen and increase the equity, and render it more proper for relief. If, therefore, the other grounds relied on for the aid of chancery were insufficient in this case, I should be reluctant to deny its competency to relieve on the principles of the mistake, under all the circumstances of the case. And in the examination of the question next in order, I think it will be found, that the application of the maxim *ignorantia juris non excusat*, in the unqualified sense contended for by many, would have the effect to condemn this contract of compromise, and a variety of others perfectly innocent, as usurious; destroy their validity entirely, and subject the creditors to the penalty of usury.

4. The question alluded to is, was the latter contract usurious?

This is a subject which has several times been recently investigated before this Court; and particularly in the case of *Thompson v. Jones*,<sup>a</sup> to which it bears many marks of analogy; but this presents some apparent indications of usury which the other did not. In that case, Jones, who con-

<sup>a</sup>1 Stewart's  
R. 566.

JULY 1839.

Ellis  
v.  
Bibb.

tracted to pay the debt of others, was under no previous obligation to pay it. His situation therefore required no forbearance. Forbearance was a necessary foundation to an usurious contract. There was no loan, nor any extension of the term of credit stipulated on the contract in favor of the original debtors. Here the complainant had been bound for the debt; and unless he was discharged, and he contracted under an impression that he was not, his situation required forbearance; and that may be considered as part of the consideration for the notes. But whether he acted under the influence of previous responsibility, the moral obligation only, the consideration of the original note and deed of trust as assigned, or all together, I have no hesitation in saying the contract was free from the taint of usury. This opinion is based on the reasons I gave in the decision of the former case, the most of which apply equally to this, and may be embraced by the general propositions, that at the time of entering into either contract, both parties acted on the conviction that a larger sum was due than the amount promised for, or in satisfaction of the original debts; that there was not in either case any device or contrivance to evade the statute of usury; and that the law governing the demand had never been expounded to the contrary; but so far as judicial decisions had gone, they had sanctioned the right to a greater amount than had been promised by either contract.

The members of the Court being at present unanimous on this point, I will more particularly notice only one branch of the argument, mainly relied on to prove this contract usurious. It is that usage or customs may and do prevail in many places, to receive extra premiums for the loan or advance of money, which premiums are currently believed by those concerned to be legal, and sanctioned by the course of trade; and where the parties are as unconscious of any violation of the statute, as they could possibly be in cases like the present; but which contracts are and have been adjudged usurious. In support of this position, cases are cited, in which, according to their custom, merchants and brokers have advanced money on agreements that the sums lent shall bear eight per cent interest, (or other legal rate,) and that a commission of, say two and a half per cent, shall also be paid for the advance. The substantial difference between cases of the description mentioned and the present, cannot escape notice. In those, it was evidently known to the parties, that instead of eight per cent, ten and a half were to be given for the loan of the

JULY 1859.

Ellis  
v.  
Bibb.

¶ 16 Johnson's  
R. 367.

money, and there was no other consideration. The custom must have originated in a device, shift or contrivance, to evade the provisions of the statute; else the premiums would have been stipulated in the simple form of ten and a half per cent for the use of the money; and that was the substance of the contract. On this point the decisions of New-York are relied on; and with others, the case of *Dunham v. Gould*,<sup>a</sup> is found to sustain the doctrine; and of which I could have entertained no doubt. Illegal or vicious customs are to be abolished. The Court there held that the statute applied "to any loan of money, wares, merchandize, or other thing whatever," at more than the legal rate of interest, for the forbearance; that the parties appeared to have contracted for the purpose of raising money at a higher rate; and the fact, that the negotiation was in the form of an exchange of notes, made no difference. "If that was the object of the parties, (and the jury have so found it,) then it was a shift or contrivance to get rid of the statute of usury; and such a shift or contrivance no Court of justice can tolerate." On the effect of the custom, the chancellor remarked, "the custom of merchants is not applicable to such a case. It is not a matter of trade and commerce, within the meaning the law merchant. And if there were such a local usage in New York, it would be null and void, and could not be set up as a cover or pretext to trample down the law of the land. The money lenders throughout the country might as well set up any practice of their own, and then plead it in bar of the statute." He admitted however, on the authority of several English decisions referred to, that a reasonable allowance beyond interest, for re-exchange and remittance of the money from a distance, or for incidental expenses, or extra trouble in the particular case, and when there is no colour of usury, would stand on distinct principles. And on the authority of other decisions, I would add to the latter class, a reasonable commission for the risk of securityships. From this slight review of the case cited, the want of analogy between it and the present is most obvious. Here it is not contended that any shift, contrivance or evasion entered into the contract.

Then for the reasons advanced, I must regard the complainant as one who had been discharged from liability by the alteration of the contract, and who was then contracting a fresh responsibility under an erroneous impression with respect to his prior obligation.

JULY 1829.

Ellie  
v.  
Bibb.

5. The concluding inquiry is, whether chancery is competent to afford relief in a case of this kind? Without entering into a particular examination of equity jurisdiction, I arrive confidently at the conclusion, that it is competent to relieve against the excess of the sum contracted; and that various considerations distinguish this case from any formerly decided by this Court, which in the argument have been supposed analogous. In this view, the alteration of the terms of the original contract by the defendant, and consequent discharge of the complainant, is a leading feature in the case. Justice and equity are strongly united in the prayer for relief against the mistakes in law, particularly on the question whether the complainant had been discharged from his former liability as security. A partial failure of consideration existed, and the principle has never been settled in this state whether in like cases common law is competent to afford relief; and chancery has often exercised the jurisdiction. I therefore, consider it a subject appropriately within chancery jurisdiction, even after judgment at law.

I think the application of the maxim *ignorantia juris non excusat*, may, on authority, be rejected from either side of this case, as before expressed. I deny its application to the defendant for the purpose of charging him with an usurious contract; and I also refuse its application, so far as it is supposed to forbid relief to the complainant against the excess of his contract beyond the consideration.

I am therefore of opinion, and in the result a majority concur, that the decree of the Circuit Court should be reversed; and that a decree be rendered by this Court, enjoining the judgments at law, except for the balance actually due on the original contract; to be ascertained according to the rule of computation as heretofore established, and herein declared; and that this relief be decreed at the cost of the complainant.

By LIPSCOMB, C. J. This case differing in its features, in my opinion, from any one of that great class of cases arising under the act of 1818, and heretofore adjudicated, commonly called the usury cases, in addition to what has been said with so much ability by my brother Saffold, I will briefly express my views on the several points presented.

A statement on the facts of the case I need not repeat, but shall proceed to inquire, how much was recoverable on

JULY 1899.

Ellis  
v.  
Bibb.

the note given by Pettus to Bibb, to which note, the complainant was one of the securities. The note was for three thousand dollars, payable six months after date, to carry interest at five per cent per month. By the rule laid down by this Court in 1824, on the construction of the act of 1818, Bibb could recover the amount of the note, with five per cent per month until its maturity, and then eight per cent per month, until paid. This construction, though dissented from by some of the Judges, and by myself among others, at the time, has been acquiesced in by the Bench ever since, and I think I am not now at liberty to call its correctness in question; the amount payable on the note by this rule of computing the interest, would be the amount of the legal liability of Ellis, according to his original undertaking as the security of Pettus. I will now inquire if he has at any time been discharged from this legal liability, and in what way. The record shews, that subsequent to the maturity of the note, Bibb made an arrangement with Pettus, giving him further time of payment, and taking new security. If this new contract was founded on a good consideration, such as could be enforced, and without the consent of Ellis, the security, that he was discharged thereby from all liability, is a conclusion founded on principles of law, now too well established, to be doubted. The consideration for which time was given, seems to be free from all objection; it was on obtaining what Bibb conceived to be additional or better security; and until this contract for further time was violated, Bibb could not resort to the process of the law to enforce payment. The doctrine so clearly laid down in *Fell on Collateral Guarantees*, and fully recognized by this Court, in *Comegys and Pershouse v. Cox et al.*<sup>a</sup> is, that if the creditor by a new contract with the principal, at any time lose the dominion of his debt, he thereby discharges the former securities. To discharge the security however, the subsequent contract must have been entered into without his assent. When a creditor undertakes to make a new contract with his debtor, who is principal, it is his duty to inform the security of it, and obtain his assent, if he wishes still to look to the security for the debt; if the security assents, it is easy to prove it; if he does not, it is difficult for the security to prove a negative. It will therefore always be inferred that it was made without his assent, until the contrary is proven. It does not appear that Ellis gave his assent, to the new contract between Bibb and Pettus, he was therefore discharged from

<sup>a</sup>1. Stewart's  
R. 262.



JULY 1820.

Ellis  
v.  
Bibb.

all liability as his security. The complainant, Ellis, subsequently made a promise to Bibb, founded on the original consideration, and gave his notes.

It is a clear rule of law, that if a security who has been once discharged by the act of the creditor, makes a subsequent promise to pay, with a full knowledge of all the facts that constituted his discharge, he is bound by such subsequent promise; a promise, so made, revives the former obligation. In this case it is not pretended but that Ellis was fully advised of the contract for giving further time; and he will not be permitted to say that he was ignorant that it had discharged him, and that his subsequent promise to pay, was in consequence of that ignorance. This dangerous principle is not essentially involved in the investigation of the case; but if it was, I would very promptly say far, far, be the time, when it should be acknowledged as law by the Supreme Tribunal of the State where my destiny and that of those most dear to me, had been fixed. Such a principle would open a scene of litigation, fraud and confusion, to which the imagination could conceive no parallel, and hope could prescribe no limitation. I will say then, that Ellis was bound by his subsequent promise, and that it revived his former liability; but how far that liability extended, remains to be inquired. I lay it down as a sound rule of law, that the moral obligation of a security to discharge the contract of his principal, extends no farther than his legal liability; this is an acknowledged rule in case of endorsors, and every other kind of securities; they are always held as bound in *strict juris*, and not by a moral obligation further than it is imposed on every one, to obey the law. If the holder of a bill does not use that diligence required by the law, he discharges the indorser; but if that indorser makes a subsequent promise, he revives the former liability; if, however, he pays more than by law he was bound to pay, it is at his own peril, and he cannot have recourse on the acceptor or maker, for such excess.

If Ellis, by his subsequent promise, revived his former liability, it was limited to it, and could not be extended beyond it; and should he pay more than in strict law he was bound to pay, he could have no recourse on Pettus for the excess.

I have before said, that the moral obligation of a security extends not beyond his legal liability; if a principal had made a promise to pay more than could have been recovered at law, on his original contract, the subsequent promise would

JULY 1859.

Ellis  
v.  
Bibb.

most likely, be in conformity to the original intention of the parties to the contract, and in him the moral and legal obligation would concur, and he would be bound to the performance. This argument cannot be applied to the security; he is not supposed to be cognizant of the original consideration, nor of the intention of the parties to the contract. This view of the different character of the obligations imposed, distinguishes this case from *Standifer v. M<sup>r</sup> Whorter*.<sup>a</sup> The confirmation set up in that case was, that the subsequent promise had been made by the original party, and not by a security. If Ellis had been principal and made the subsequent promise, it would have been analogous to the case above referred to; or if Pettus had made a subsequent note to Bibb, for a greater amount than could have been collected from him on the original note, and Ellis had gone security on the last, they would both have been held liable for the whole amount; on the ground, that it was a confirmation of the original undertaking. But if Ellis, a security, has given his own note for a greater amount than could have been collected from his principal, the excess is not supported by a good consideration; and a Court of Chancery ought to relieve him *pro tanto*. A Court of law would have found some difficulty in scaling the contract, as it was only a part failure of consideration; the consideration was good, commensurate with the liability of Pettus; but that difficulty is not encountered in Chancery. It is urged that the deed of trust from Pettus to Coleman for the benefit of Bibb, and transferred by Bibb to Ellis at the time the subsequent promise was made, is of itself sufficient to support the promise as a valuable consideration. This argument would have had much force in a Court of law, and would perhaps have been unanswerable; and this may be an additional reason why the complainant should be heard in chancery in preference to driving him to his defence at law. A Court of law would have felt itself confined to the fact of the transfer of the deed at the time the subsequent promise of Ellis was made, and might have felt bound to call it a sufficient consideration in law to support the promise; but a Court of Chancery is not restrained to such narrow limits in its inquiry; it can probe the intention of the parties, and ascertain from the whole transaction, whether the note was given by Ellis in payment for the purchase of the deed from Bibb or not. No one can believe for a moment, after a full examination of the facts, that the deed was sold by Bibb to Ellis; it was

<sup>a</sup> 1 Stewart's  
R. 532.

JULY 1839.

Ellis  
v  
Bibb.

only given up by Bibb as a kind of forlorn security, out of which Ellis might possibly re-imburse himself for the money he had paid for Pettus, on the revival of the original liability. The Chancellor could not possibly believe that Ellis made his subsequent promise in consideration of the assignment of this deed; and when it is recollected that the negroes named in that deed as sold and conveyed, had been at that time run to parts unknown, beyond the jurisdiction of the United States; the idea that Ellis should have bought them, knowing all the circumstances, is altogether preposterous; and not reconcileable with the ordinary motives of human action. I am of the opinion, that the deed of trust cannot be held to be the consideration of Ellis' promise, but that the prior liability was the moving consideration; and that consequently, Bibb cannot recover more from Ellis than he was originally bound for; and that Chancery should perpetually enjoin the excess. That the decree must be reversed and rendered at complainants cost.

By JUDGE COLLIER. Leisure has not permitted me to bestow that reflection which was desirable, upon the many questions brought to the view of the Court by the arguments, as well for the appellant as the appellee. I shall therefore forbear an expression of opinion upon many of them, and content myself with considering such points as are deemed decisive of the case, uninfluenced by the operation of others.

It would be a profitless expenditure of language to point out the vast multitude of cases in which Chancery interposes its aid. The jurisdiction of that tribunal is extraordinary, and can only be invoked when Courts of law, by reason of their manner and principles of procedure, cannot administer full, adequate and complete relief; or where if their powers are adequate, the remedy is not well ascertained, or difficult to be made available at law.<sup>a</sup> It is enough to shew that it would have been difficult for the appellant to have defended himself at law; without instituting an inquiry into the powers of such a Court, predicated upon the facts which the records exhibits.

Had the appellant have alledged in his defence at law against the action of the appellee, that the notes given by him to the appellee on the adjustment of his supposed liability as the security of Pettus, were made without consideration, he would have been met with the transfer of the note of his principal, and the deed securing its payment

<sup>a</sup> 1 Atk. 128.

<sup>1</sup> Vesey 331.

<sup>1</sup> Ves. jr. 424.

<sup>2</sup> Stra. 733.

JULY 1895.

Ellis  
v.  
Bibb.

to the appellee, as a consideration for his notes; and he would have found it difficult, if not impracticable, successfully to have counteracted them: even supposing the powers of the law Court adequate to an extension of the inquiry in every shape the defence might assume. Besides, the weight of opinion being against a defence at law for a partial failure of consideration, unless he had have shewn an entire failure, which I am of opinion he could not have done, his defence at law would, most probably, not have been entertained. Without therefore expressing an opinion upon the legal questions presented by this topic of the argument, I have no hesitation in concluding that such defence was, to say the least, doubtful or difficult at law; and hence conclude that chancery should lend its ear.

I am next brought to consider the consideration for making the appellants notes. Surely it was not the transfer of the note and deed of Pettus by the appellee. The appellee does not in his answer pretend that the moving cause with the appellant to make his notes, was that transfer. It is against the course of human dealing to suppose that he would have exchanged his own paper for that of an individual who had fled his country, leaving nothing from which his creditors could coerce a collection of their demands; an individual too, who had just given a striking manifestation of an indisposition to comply with his engagements; an individual who evinced a destitution of a correct sense of moral duty, by a failure to provide an indemnity for his security here, and had fixed his residence in a country, where, if history is to be accredited, justice then had no forum, and strict right few advocates. No, the true consideration of the appellants notes was a compromise of, his supposed liability to pay the note which he had before underwritten for Pettus; and though an application of the principles of law, as administered in such a Court, might consider the transfer of the note and deed of Pettus as a consideration; chancery, without relaxing the rules of law which obtain there, can view the facts as they really exist, and administer justice upon a more enlarged system. In its comprehensive grasp it looks beyond the letter of the contract, to ascertain if practicable, as the most unerring rule by which a correct understanding may be attained, the true state of fact, and the intention of the parties. What are the facts? The appellee held a note on William Pettus and Freeman Pettus, and the appellant as his security; in March, 1821, he gave day to the principal, on his making

JULY 1839.

Ellis  
v.  
Bibb.

a conveyance of personal property, in trust, for its payment twelve months thereafter. This arrangement between the appellee and the principal debtor, was made without the assent of the appellant. Some few months afterwards, when he was advised by the appellee of the arrangement, he seemed to be pleased, said his responsibility was diminished, but did not further consent or object to a continuance of his liability; about six months after this advice to the appellant, his principal left this State, taking with him to Texas, one of the Mexican States, the property conveyed for the security of the debt; and there, he himself has since resided. So soon as these latter facts were known to the appellee, he endeavoured to adjust with the appellant the note of his principal; and as an inducement to him to renew or acknowledge his liability, agreed to remit a portion of the excessive interest; and upon perfecting the compromise, did actually make such remission.

I am of opinion, that the indulgence given by the appellee to Pettus, discharged the appellant from all liability as his security; that the giving of time was a new contract, to which he was not a party, and therefore could not be obliged for its performance by Pettus. That the liability even of the principal himself on the original contract, was merged in the contract giving further time, or the remedy upon it thereby suspended until the expiration of the time fixed for its payment by the modified contract. As the appellee voluntarily renounced, without the appellants consent previously or simultaneously given, the right to coerce payment of the note from his principal for a time, it must, as it respects the security, be gone forever.

a *Comegys & Pershous v. Cox & Harris.*  
1 *Stewart's R.* 262.  
*McLemore v. Powell.*  
12 *Wheaton.*

To determine otherwise, would be to create a liability without the consent of him on whom it is imposed. I say to create a liability, for as it has been said, the pre-existing liability was entirely extinguished by the act of the appellee; and this rule is founded upon wise reasons. If the creditor were to permit the contract first entered into to remain unsuspended in its force, he might perhaps, before the day when the modified contract was to be performed, obtain a compliance with the original, either with or without a resort to legal coercion; or if the creditor was about leaving the country, he might cause process to be executed, which would insure the amenability of his person, and consequently his property. On this point it is needless to go more into detail, the case of *Comegys and Pershous v. Cox and Harris*, is considered as decisive.

JULY 1829.

Ellis  
v.  
Bibb.

The appellant being discharged by the indulgence to Pettus, what consideration was there for his notes to the appellee? If Pettus had removed himself and property beyond the reach of legal process without an effort on the part of the appellee to restrain him, the appellant would have been under no moral obligation to indemnify him to the extent of his original liability. This I say would have been the case, if this feature of the cause could be divested of all other circumstances calculated to exercise an influence on it; but the circumstance of the appellants not objecting, but rather professing, when advised by the appellee, to be pleased with the agreement with Pettus, though not constituting a promise in itself, because too equivocal in its import, is from the sense in which the appellee must have understood it, to be considered as imposing a moral obligation upon him, to the extent of his original liability; and the notes executed by him to the appellee upon the compromise are, *pro tanto*, recoverable.

A security unless discharged in the manner mentioned, or in some other way, is to be considered as continuing under a moral obligation to pay the debt of his principal; but this obligation only extends to perform the contract so far as his principal and himself were responsible upon it. The undertaking of the security is, that his principal shall perform his contract according to law. This Court having decided in June 1824, in the case of *Henry and Winston v. Thompson*,<sup>a</sup> that on such a note as the one underwritten by the appellant, the excessive interest was only recoverable up to its maturity, and that after that time, it drew the statute rate; I am of opinion that the appellant's liability should be graduated by that rule.

<sup>a</sup> Minor's Ala.  
Rep. 335.

I take pleasure in remarking, that this cause has been argued with distinguished ability; but while with the utmost sincerity, I make this declaration, I must be permitted to say, that many of the conclusions of the learned counsel for the appellee were founded on false hypothesis, and generated by a neglect to distinguish between the case of a principal and his security.

I concur in the conclusion of the opinion of the Court, but express no opinion on any point not embraced by this opinion.

Decree reversed and rendered.

Judge CRENSHAW presided below and did not sit.

SHORTRIDGE and GAYLE, for plaintiff in error.

HOPKINS and M'CLUNG, for defendant.

JULY 1829.

Robinson.  
v.  
Rapelye and  
Smith.

## ROBINSON V. RAPELYE and SMITH, survivors, &amp;c.

1. The answer of a garnishee in attachment is to be taken as strictly true; and if a deed is appended, it is to be considered as genuine; unless the answer be traversed.
2. A deed of assignment by a debtor of all his effects for the benefit of all his creditors, is not void on account of the debts and property not being particularly described and specified.
3. Such deed will be operative against an attaching creditor here, though made in New-York.
4. A debtor has a full right to prefer some creditors to the exclusion of others; and may lawfully stipulate that those who accept the property conveyed shall release him; the contract being voluntary.
5. The insolvency of the debtor does not vary these rules; no bankrupt law being here in existence.

On the 4th of June 1824, Franklin Robinson sued out an original attachment against Daniel Rapelye and William Smith, as surviving partners of the late firm of Lawrence, Rapelye, & Co. of New York, (John T. Lawrence having previously died,) to recover \$2213 58, which he claimed of said firm as balance of an account current. The attachment was returned to the Fall term of Marengo Circuit Court. The sheriff returned that there was no property of the defendants in his county to be found, but that he had on the 14th July, 1824, attached the amount in the hands of the firm of Glover, Gaines, & Co. and of the firm of Glover & Gaines; and that he had summoned them to appear and answer as garnishees what they were indebted to the defendants in the attachment. A duplicate writ of attachment was issued to Greene county, and Thomas H. Herndon of said county appeared as a garnishee.

At March Term, 1825, Glover, Gaines, & Co. filed their answer as garnishees; in which among other matters they stated, that they were indebted to the late firm of Lawrence Rapelye & Co. in the sum of \$605 63 due by open account; but further stated that before the attachment was sued out by the plaintiff "they were notified by letter from Thomas Lawrence and others, representing themselves to be the assignees of Lawrence, Rapelye, & Co. of the failure of said Lawrence Rapelye, & Co. and that the debts and effects of said Lawrence, Rapelye, & Co. had been assigned to them for the benefit of their creditors, which said assignment is hereunto annexed." (See copy in note A.)

(A.) Copy of the deed of assignment and accompanying certificates of probate, &c.

(L S.) United States of America, State of New York. By this Public instrument be it known to all whom the same doth or may

At March Term, 1827, Thomas H. Herndon filed his answer as garnishee, stating that he was the agent of several creditors to collect debts due from the firm of I. & T. Crowell; that he had been authorized by all the creditors

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.

concern, that I, Augustus Floyd, a Public Notary, in and for the State of New York, by letters patent under the great seal of said State, duly commissioned and sworn; and in and by the said letters patent, invested "with full power and authority to attest deeds, wills, testaments, codicils, agreements, and other instruments in writing, and to administer any oath or oaths, to any person or persons;" do hereby certify, that the annexed is a true copy of a certain original indenture of assignment produced before me, and duly proven before Robert L. Wilson Esquire, a commissioner for that purpose appointed; and I do further certify, that the certificates of the proof of the said indenture of assignment, on the said Indenture endorsed, (of which said certificates copies are hereunto annexed,) are the true and proper certificates of the said Robert L. Wilson, and that the said Robert L. Wilson is a commissioner duly appointed according to law, to take the proof and acknowledgement of deeds &c. and that his said certificates ought to have full faith and credit, and that all deeds and instruments in writing by him certified to be proven as aforesaid, are entitled to be read in all Courts of Justice. Whereof an attestation being required, I have granted this under my notarial firm and seal. Done at the city of New York in the said State of New York, the seventh day of April in the year of our Lord one thousand eight hundred and twenty-four. *In Præmissorem Fidem.*

AUGUSTUS FLOYD, *Public Notary.*

### *Indenture of assignment.*

This Indenture, made this sixth day of August in the year of our Lord one thousand eight hundred and twenty-three; between John T. Lawrence, Daniel Rapelye, and William R. Smith of the City of New-York, merchants, composing the mercantile house, or firm of Lawrence Rapelye and company, of the first part; Peter Remson, Thomas Lawrence, and Benjamin Smith of the same city merchants, of the second part; and the several other persons whose hands and seals are hereunto subscribed and affixed, creditors of the said Lawrence, Rapelye and Company of the third part, witnesseth; that the said parties of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for other considerations, have bargained, sold, aliened, released and confirmed, and by these presents do bargain, sell, alien, release and confirm unto the said parties of the second part, and to their heirs and assigns, all and singular the lands, tenements, and hereditaments belonging to the said parties of the first part, jointly, situate in the State of Georgia, or in the State of Alabama; and the reversion and reversions, remainder and remainders, rents issues and profits thereof, and all the right, title,



JULY 1839

Robinson  
v.  
Rapelye and  
Smith.

among whom were Lawrence, Rapelye, & Co. to compound with the said Crowell's for a gross sum, subject to distribution among them in proportion to their demands; that he had done so, and received debts and notes payable to him

estate, property, interest, claim and demand whatsoever, both in law and equity, of them the said parties of the first part, of, in and to the same, with the appurtenances; to have and to hold the same and every part and parcel thereof with the appurtenances, unto the said parties of the second part, their heirs and assigns forever, as joint tenants, and not as tenants in common; and all deeds, evidences, and writings concerning or touching the same: In trust nevertheless, and to and for the uses and purposes hereinafter mentioned.

And this Indenture further witnesseth; that for the aforesaid considerations, the said parties of the first part, have bargained, sold, assigned, transferred and set over, and by these presents do bargain, sell, assign, transfer and set over unto the said parties of the second part, their executors, administrators and assigns, all and singular the goods, wares and merchandize, bills, bonds, notes, and other securities for money, debts, moneys, stock in trade, chattels and personal estate and effects whatsoever, and wheresoever, which the said parties of the first part are jointly possessed of or interested in, or entitled to as partners of the said mercantile house or firm of Lawrence, Rapelye and Company, and not otherwise; together with all Books of account, vouchers and other papers in any wise concerning the same; and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part, of in and to the same. To have and to hold the same to the said parties of the second part, and the survivors and survivor of them, and their or his assigns, and to the executors and administrators of such survivor for ever: In trust nevertheless, and to and for the uses and purposes hereinafter mentioned. That is to say, upon the trust, with all convenient speed, to sell and dispose of and convey, all the said real and personal estate and property hereby conveyed and assigned, at such prices, and on such terms as the said parties of the second part, or the survivors or survivor of them, or the executors or administrators of such survivor, may deem expedient; and to collect in the discretion of the said parties of the second part, the survivors or survivor of them, or the executors or administrators of such survivor, the said debts, or sums of money, and all other the premises hereby assigned: And out of the trust moneys which shall come into their or his hands, or the hands of either of them therefrom, in the first place to retain and re-imburse themselves all costs charges and expenses whatsoever, which they respectively shall or may sustain, expend or be put to, in preparing these presents, or in and about the execution of the trusts hereby reposed in them, or otherwise relating thereto: And in the second place, out the residue of the said trust moneys, from time to time as the same shall be received in sufficient sums, for distribution, to pay and satisfy *pari passu*, and without preference or priority, to Samuel Clarke, of Augusta, in the State of Georgia, the sum of three hundred dollars due for rent &c; and

in his own name but for their account; that he had in his hands \$1824 82 as the share due to Lawrence Rapelye & Co. or their assignees, out of said fund, subject to a deduction of about \$200, for his services and expenses of col-

JULY 1859.

Robinson  
v.  
Rapelye and  
Smith.

to such of the several persons, or mercantile firms, named in the schedule hereunto annexed marked A, as within thirty days from the date hereof shall execute these presents, the several debts and responsibilities or engagements referred to in the said schedule A, not exceeding the amounts set opposite their respective names in the said schedule, which the said parties of the first part now owe to the said persons or mercantile firms, or which the said persons or mercantile firms respectively may hereafter pay and discharge: and also to pay and satisfy in like manner any interest that has accrued, or may accrue on the same amounts or any part thereof: and in the third place, out of the residue of the said trust moneys, after the aforementioned payment of principal and interest, to pay and satisfy as far as the said residue may suffice, *pari passu*, and without preference or priority, to such of the creditors of the said parties of the first part named or referred to in the schedule of debts hereunto annexed, marked B, as shall within two months from the date hereof execute these presents, the sums mentioned in the said schedule B, opposite the names of the said creditors; and all interest due or to grow due thereon. And in the fourth place, after the payment and satisfaction of the said debts last referred to, and the interest thereon as aforesaid; then out of the residue of the said trust moneys to pay, satisfy and discharge all other debts and responsibilities not herein before provided for, due and owing from the said parties of the first part, or which shall become payable hereafter to such creditors of the said parties of the first part, jointly and not severally, as shall within four months from the date of these presents have executed the same, towards satisfaction of their respective debts proportionably, so far as said residue will extend to satisfy the same. Provided nevertheless, and it is hereby agreed and declared, that the said parties of the second part may employ such clerks and agents, to aid them in the execution of the said trust, and at such rate of compensation as the said parties of the second part, the survivors or survivor of them, or the executors or administrators of such survivor may deem proper; and that the said parties of the second part, the survivors or survivor of them, shall be allowed a reasonable commission for their services in the execution of the trust hereby reposed in them, on the said trust proceeds after deducting the costs and expenses accruing thereon; which commission may be retained out of any part of the said trust proceeds, any thing herein before mentioned to the contrary thereof notwithstanding: and it is further declared, that the purchaser or purchasers of the said trust property, or of any part thereof, shall not be in any wise answerable for the loss, non application, or misapplication of the purchase moneys, or any part thereof, by the said parties of the second part, the survivors or survivor of them, or the heirs, executors or administrators of such survivor; and that the said parties of the second part, the survivors, or survivor of them,

JULY 1822.

Robinson  
v.  
Rapelye and  
Smith.

lection. That in the year 1823, and previous to being garnisheed in this case, he received while in New York, a written notice that the interest of Lawrence Rapelye & Co. had been assigned to Thomas Lawrence, for himself, Peter

and the executors or administrators, or heirs of such survivor, shall be charged, and chargeable, each respectively for his own acts and defaults only, and not for the acts and defaults of the other, or others; and that neither nor any of them shall be charged with or for any sum or sums of money, other than what shall actually come to his or their hands by virtue of these presents, nor with any loss that shall happen, touching or concerning the aforesaid trust estate, or any part thereof, without his or their respective wilful default. And the better to enable the said parties of the second part to execute the said trusts, the said parties of the first part, have hereby constituted and appointed the said parties of the second part, the survivors and survivor of them, and the executors and administrators of such survivor, to be the true and lawful attorneys and attorney of the said parties of the first part, irrevocable, in the names, place and stead of the said parties of the first part, or any or either of them, but for the uses and purposes aforesaid, to ask, demand, sue for, recover and receive from the several debtors of the said parties of the first part, or any other person or persons having any of the said bargained and assigned premises in his or their possession, or custody, all and singular the goods, wares and merchandize, debts, accounts, sums of money, and other the premises hereby assigned, or mentioned, or intended so to be; and on receipt thereof, to make, seal and deliver in the names of the said parties of the first part, or any or either of them, good and sufficient acquittances and discharges therefor; and to take any legal means for the recovery thereof; and to make any composition or agreement respecting the same, or any part thereof by arbitration or otherwise, as they may deem proper; and to do all other act and acts touching the premises, as fully in every respect, as the said parties of the first part, or any or either of them could do if personally present; and one or more attorneys under the said parties of the second part, the survivors or survivor of them or the executors or administrators of such survivor for the purposes aforesaid, or any of them, to make and substitute and at pleasure revoke: and the said parties of the second and third parts, in consideration of the premises, and of one dollar to each of them in hand paid by the said parties of the first part, at and before the sealing and delivery of these presents, do hereby for themselves respectively, and for their several and respective partners, heirs, executors and administrators, remise, release, and for ever quit claim unto the said parties of the first part, and each of them, their and each of their heirs, executors and administrators, and every of them, all and all manner of actions, cause and causes of action, suits, debts, bonds, bills, notes, accounts, claims and demands whatsoever, both at law and in equity, which against the said parties of the first part, jointly they the said parties of the second and third parts, or any or either of them ever had, or are now entitled to for or by reason or means of any act, matter, cause or thing whatsoever, from

Remson and Benjamin Smith, requiring him not to pay to any other person than one of those mentioned, the moneys which he then had, or might afterwards receive on account of said firm, unless authority was produced from them. He

JULY 1833.

Robinson  
v.  
Rapelye and  
Smith.

from the beginning of the world to the day of the date hereof. This assignment and the trusts, and matters therein contained, and the rights, estate and interest thereby secured excepted. In witness whereof the said parties have hereunto set their hands and seals, the day and year first herein written.

*Memorandum.* It is expressly declared to be the meaning and intent of the foregoing presents, that the release and quit claim contained therein, and thereby made to the said parties of the first part, shall not be construed or taken to operate upon or extend to any promissory note or notes, or bill or bills of exchange which have been made payable or indorsed to, or have come into the hands of any person or persons, or mercantile firm, (who shall execute these presents) as agents or attorneys for others, and have been indorsed or negotiated, or transferred by the said agents or attorneys, or any of them; but the liability of the said parties of the first part, and each and every of them on the said notes or bills of exchange respectively, to the true owners thereof, and to the several parties thereto, shall remain wholly unaffected and unimpaired; notwithstanding the execution of the foregoing presents by such agent or agents, any thing in the said assignment, or foregoing presents contained, to the contrary notwithstanding.

Sealed and delivered (Signed) in the presence of  
*Maria J. Lawrence,*  
*Thomas Lawrence,*

Jno. T. Lawrence, [seal]  
Daniel Rapelye, [seal]  
Wm. R. Smith, [seal]

By Daniel Rapelye and William R. Smith in the presence of  
*S. P. Gregory. Jeromus Rapelye.*

Thos. Lawrence, [seal] As-  
Benj. Smith, [seal] sign-  
[seal] ces.

Witnesses to the signatures  
of the assignees  
*Pierce V. C. Miller,*  
*Samuel A. Miller*

Henry Thomas \$11,432 02 [seal]  
Benj. Smith, transacting bu-  
siness under the firm of  
Dunton & Smith, [seal]  
Thomas Lawrence, [seal]  
John F. Lawrence, [seal]  
Thomas G. Casey, [seal]

Sept. 2, 1823.

" 2, "  
" 2, "  
" 2, "  
" 2, "  
" 2, "  
" 3, "  
" 3, "  
" 4, "  
" 5, "

Abraham Riker, transacting  
business under the firm of  
Abraham Riker, & Co. [seal]  
John Penfold, [seal]  
Wm. Penfold, [seal]  
George Sharp, [seal]  
James N. Tuttle, [seal]  
Thomas Tileston, [seal]  
John Herriman, [seal]  
Egbert Davis, [seal]  
John Wells, [seal]  
Thomas Van Antwerp,  
Parish Holbrook, & Co. by  
Hy. Parish, for \$1116 36-100 [seal]  
in the first class.  
David J. Boyd & Co. by [seal]  
David J. Boyd, [seal]  
Payne Spofford, [seal]  
Peter Remson, [seal]

JULY 1829

Robinson

v.

Rapelye and  
Smith.

further stated, that about two thirds of the amount then in hand had been collected since he was garnisheed; and that there would be, when collected, a further fund liable to distribution in the same manner as the fund now in hand.

Sept. 9, 1823.

" 13, "

Samuel Hickok,  
Caleb Hopkins,[seal]  
[seal]

Witnesses to the signatures of  
Benjamin Smith, Thomas Lawrence,  
Thomas G. Casey, John F. Lawrence,  
Abraham Riker, John Penfold, Wm. Penfold.

*Schedule A, of creditors, debts and responsibilities or engagements,  
referred to in the annexed assignment.*

T. &amp; J. F. Lawrence &amp; Co. for exchanged

paper,

\$26462

Do. for endorsements of notes,

5451 91

\$ 31,913 91

Henry Thomas for exchanged paper,

11,431 00

Dunton &amp; Smith for

ditto,

10,124 00

Herriman &amp; Davis for

ditto,

5001 00

J. &amp; L. Van Antwerp for

ditto,

2600 00

Abraham Riker, &amp; Co. for

ditto,

4627 39

J. &amp; W. Penfold for

ditto,

\$4571 62

Do. for money collected,

219 85

4791 47

Peter Remson for endorsements in the  
name of Peter Remson & Co.

\$47100 00

Peter Remson for bonds to the Custom

House,

1310 00

Do. as security to the Bennet estate,

5000 00

Do. for money lent by him,

2000 00

55410

David Boyd &amp; Co. for money collected,

231 66

Spofford, Tilliston & Co. for ditto \$441 75  
and \$453 70,

895 45

Sharp &amp; Tuttle for

ditto,

567 23

Parish, Holbrook, &amp; Co. for

ditto,

1116 36

John Wells for Stock of the Pacific Insurance Company transferred by him,  
and pledged or appropriated for debts  
of Lawrence, Rapelye & Co.

16,000 00

Rapelye, Bennet &amp; Co. for money collected,

1000 00

\$145,709 47

JOHN T. LAWRENCE.

*Schedule B. of creditors and debts referred to in the annexed assignment.*

Adrian Van Sinderen,

\$8203 30

Estate of Richard Lawrence,

9046 79

Simon Remson,

5613 97

The assignees of Lawrence Rapelye & Co. appeared by their counsel; and due notice by publication having been given to the defendants in the attachment, and they failing to appear, the plaintiff, at March term, 1827, moved the

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.

Adrian Van Sinderen and William Lawrence, Guardians of Richard Lawrence and Isaac Lawrence, sons of Richard Lawrence, deceased.

3493 11

William Lawrence,

1829 22

Thomas R. Lawrence,

3678 26

Ulpian Van Sinderen,

4558 49

E. A. Underhill,

100

Caleb Hopkins,

1187 05

Estate of Gillespie and Campbell,

1613 25

Creditors of Russell, & Co.

1864 62

Samuel Hickok,

1224 21

---

\$42,411 27

JNO. T. LAWRENCE.

STATE OF NEW-YORK,

City and County of New-York, } ss.

On this thirtieth day of December, in the year of our Lord one thousand eight hundred and twenty-three, before me Robert L. Wilson, a commissioner in and for the City and County of New-York, duly authorised to take the proof and acknowledgement of Deeds, &c. personally came and appeared Seth P. Gregory of the said city, (to me known,) who being by me duly sworn according to law, on his oath did say, that he was present and did see Daniel Rapelye and William R. Smith, known to him to be the same persons described in, and who executed the within indenture of assignment, duly execute the same, for the uses and purposes therein contained; and that he the said Seth P. Gregory, together with Jeromus Rapelye, became subscribing witness to such execution. All which being to me satisfactory proof of the due execution of the said Indenture of assignment by the said Daniel Rapelye and William R. Smith, and there appearing no other material erasures or interlineations therein, except those noted I do allow the same to be recorded.

(Signed) ROBERT L. WILSON, *Commissioner, &c.*

STATE OF NEW-YORK,

City and County of New-York. } ss.

On this thirty-first day of December, in the year of our Lord one thousand eight hundred and twenty three, before me Robert L. Wilson a Commissioner in and for the city and county of New-York, duly authorised to take the proof and acknowledgement of Deeds, &c. personally came and appeared Maria J. Lawrence of the said city (to me known,) who being by me duly sworn according to law, on her oath did say, that she was present and did see John T. Lawrence, known to her to be the same person described in, and who executed the within indenture of assignment, duly execute the same, for the uses and purposes therein contained; and

JULY 1839.  
 Robinson  
 v  
 Rapelye and  
 Smith.

Court for judgment by default against the defendants, and also for judgment against the garnishees on their statements filed. But the Court, being of opinion that the deed of assignment referred to and produced, and the notice thereof given by the assignees, protected the debts in the hands of the garnishees, overruled said motions, discharged the garnishees and rendered judgment for costs against the plaintiff.

*Robinson*, assigned the judgment of the Court below for error, alleging several reasons why it should be reversed.

VAN DE GRAAFF, for the plaintiff in error. Our attachment was levied on *choses in action* of the assignors, not assignable, either by the principles and policy of our own laws, or by those of New York. Consequently, the legal interest in the rights and credits attached still remained in the defendants, after the assignment; and *at law*, the garnishees must be regarded as the debtors of the defendants, up to the time of the levy of our attachment. A Court of law merely, cannot, without invading the province and peculiar jurisdiction of a Court of Chancery, take notice of the assignment of balances due upon mere open running accounts; and the assignor to whom such balances are due, is regarded, *at law*, as the creditor, after the assignment: otherwise, surely, in an action by the assignee of a chose in action, not negotiable, the defendant would not be permitted to set off a demand due to him from the legal plaintiff; but this, the defendant would in all cases be allowed to do; and he would thereby in effect defeat the assignment, to satisfy a debt due from the assignor.<sup>a</sup>

a 7 Term Rep.  
 667.  
 Chit. on Bills.

This deed of assignment was made in New York. It transfers the whole estate of the assignors in Alabama, real and personal, to the assignees: the very property upon

that she the said Maria J. Lawrence became a subscribing witness to such execution. All of which being to me satisfactory proof of the due execution of the said Indenture of assignment by the said John T. Lawrence, and there appearing no material erasures or interlineations therein, except those noted, I do allow the same to be recorded.

(Signed) ROBERT L. WILSON, *Commissioner, &c.*

Recorded in the Office of Register in and for the city and county of New-York in Lib. 172 of Conveyances, page 309, on the 31st day of December, 1823, at half past one o'clock, P. M. Examined by JAS. W. LENT, *Register*.

Endorsed Lawrence, Rapelye, & Co. to Peter Remson and others, A true Copy.

AUG'S FLOYD, *Public Notary*.

which, principally, their credit was acquired and sustained here. Its object is also to prefer New York creditors, to the exclusion of creditors elsewhere. Now although our Courts perhaps would not hesitate to carry into effect the provisions of this deed, as to all persons who are parties to it, they would surely not be required to enforce its provisions against our own citizens, not parties to it. The legal right of an insolvent debtor to prefer a particular creditor, or class of creditors, is not disputed; but the mode in which this right is attempted to be exercised, ought to be unexceptionable. It ought to be with the knowledge and consent of the creditor intended to be preferred; a direct assignment of specific property to pay a specific debt or debts; and it should be done without incurring unnecessary and heavy expenses and charges upon the debtor's estate. But this deed was executed by the assignor without the knowledge or consent of even the preferred creditors; and their number and the amount of their demands, as well as the value of the property transferred, is wholly unspecified. The expenses which must necessarily be incurred in effectuating the provisions of the deed, cannot but be very large; the funds consequently which ought to be exclusively appropriated to the payment of the debts of the defendants, are unnecessarily diminished and wasted away.

This assignment being a contract made in New York, between citizens of New York, our Courts will lend their aid to effectuate its provisions, as against any person whatever, only from the principles of comity. Would it not be carrying the principle too far, to support the deed against, and to the ruin of our citizens? Lord Mansfield, in the case of *Le Chevalier, assignee of Dormer v. Lynch*,<sup>a</sup> seems to have been careful in the choice of his terms. He says "In Scotland, they permit assignees of a bankrupt in England to sue for money owing to the bankrupt in Scotland; but only where their own citizens would not be thereby exposed to unjust injury." Mansfield further observes, that it has been determined at the *cockpit*, that bills by English assignees *may* be maintained in the plantations upon demands due to the bankrupt's estate. But if in the mean time, after the bankruptcy, and before payment to the assignees, money owing to the bankrupt out of England is attached, *bona fide*, by regular process, according to the law of the place, the assignees in such case cannot recover the debt." By the laws of Scotland, all effects of a foreign bankrupt, situated in Scotland, are secured for

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.

at Doug. Rep.  
169.



JULY 1839.

Robinson  
v.  
Rapelye and  
Smith.

the benefit of Scottish creditors; and in turn, they will not in England, permit a Scottish creditor to come in under the assignment for a share of the bankrupt's estate, unless their priorities at home be relinquished. That an assignment under the bankrupt laws of a foreign State, would not be supported here against our own attaching creditors, cannot at this day be controverted upon principle or authority.<sup>a</sup>

<sup>a</sup> Topham v. Chapman.  
1 Const. Rep. 229, 20 Johns. Rep. 229. 259.  
1 Doug. 170, 4 Day's Rep. 146. 5 Mass. Rep. 42.  
5 Cranch 289, 6 Binney 353.  
4 Johns. Ch. Rep. 460.

One objection to voluntary assignments like this, is, that they may be used in aid of foreign bankrupt laws, and if enforced here against our own creditors, every foreign bankrupt may establish and dictate to our citizens, an individual bankrupt law of his own. Support this assignment against our attaching creditors, and you send our own citizens abroad to collect their debts: you permit interested foreign merchants to change the party liable, and no summary mode of redress against fraudulent assignees exists in such cases, as in cases of bankruptcy. Nor can it be expected, in general, that such voluntary assignments, where the assignees are chosen by the bankrupt himself, will be conducted with the same propriety and justice, as assignments under the foreign bankrupt laws. It would consequently be more dangerous for our Courts to sustain voluntary assignments like the present, than to adopt and enforce the bankrupt laws of foreign States.<sup>b</sup> Voluntary assignments in England of the character of the one now under consideration, are void, because they operate against the policy of the bankrupt laws. They should be held void here, when made abroad, because they operate against the policy of our attachment laws, which allow a citizen to attach the effects here, of a non resident, to satisfy his demands.

<sup>b</sup> 4 Day's Rep. 146. 5 Mass. Rep. 144.  
13 Mass. Rep. 146. 17 Mass. Rep. 454. 552.

The deed of assignment itself is void and fraudulent as to creditors. An assignment made of all the effects of the assignor is fraudulent if it reserves a trust to the assignor. Now the assignment in question contains a trust for the benefit of the assignors; the effects assigned, are according to the deed of assignment, to be appropriated to the payment of such creditors as shall sign the deed, release, &c. in certain periods mentioned. No creditors who do not make themselves parties to the deed and release, are to be paid any thing. Now suppose no creditor chooses to accept the terms offered in such an assignment, or only a few, upon a secret understanding, and whose debts would consume but a small share of the property assigned, I would ask if the property assigned, or the surplus, would not be

JULY 1828.

Robinson  
v.  
Rapelye and  
Smith.

---

held by the assignees for the use of the assignors? If an assignment like the present could be supported, it would be easy to place property out of the reach of creditors; only assign your effects to a pliant trustee, upon an agreement with all your creditors except the one intended to be fleeced, that they will not become parties to the deed, and then, if the terms prescribed in the deed be so unreasonable that the intended victim will not accept them, the property assigned, no matter where it may be situated, is effectually put beyond his reach.

The proof of the execution of the instrument is insufficient to authorize this Court to recognize it; the making, sealing and delivery of the deed, is not established according to the rules of law.

HITCHCOCK and ELLIOTT, for the defendants in error, argued that the deed of assignment was not void or fraudulent in law, and that a debtor could legally prefer one creditor to another;<sup>a</sup> that wherever, according to the English authorities, assignments not fraudulent in point of fact have been set aside, in consequence of the preference given by the debtor in embarrassed or insolvent circumstances, to a particular creditor or creditors, it was in cases in which their Courts invariably assumed the position that the assignment was executed contrary to the spirit of, or in contravention of the provisions of the bankrupt law of England;<sup>b</sup> that issues not having been tendered to controvert the shewing made, or the facts stated in the answer of the garnishees, that all the facts stated in the answer were to be taken as true,<sup>c</sup> and that therefore the plaintiffs were precluded from contending that the parties were under any legal disability, or that the deed was not duly executed, or that it was not supported by adequate consideration, or in a word, that it was fraudulent; because the answer was not traversed. They further argued, that no judgment could be rendered against the garnishees, nor against the defendants in attachment, because, unless the garnishees were liable, the process of attachment being a proceeding *in rem*, there was nothing subject to the attachment upon which a judgment could be legally predicated;<sup>d</sup> and that therefore, the judgment should be affirmed.

KELLY, in conclusion.

The cause was argued at the July term, 1828, of the Court, and held under advisement, and after a second argu-

*a* Marbury v. Brooks.  
7 Whea. 536.  
572. Phenix v. assignees of Ingraham, 5 Johns. Rep. 412. 3 Johns. Rep. 72.  
20 Johns. 229.

*b* Potter v. Brown, 5 East. 125. Ingles et al. v. Grant, 5 Term 530.  
*c* Allen v. Morgan, 1 Stewarts R. 9.

*d* 3 Johns. R. 72.

JULY 1849.

Robinson.

v.  
Rapelye and  
Smith.

ment at this term, the opinion of the majority of the Court was delivered

By JUDGE COLLIER. On the answers of the garnishees, the plaintiffs moved the Court below for a judgment against them; which motion was overruled, and a judgment rendered by which they were discharged. The correctness of which judgment is now assigned for error. In determining this question, two points are presented: 1. The legality of the deed which accompanies the answer of Messrs G. G. & Co. 2. The extent and effect of its operations.

The counsel of the plaintiff insists, that the deed cannot be recognized as valid, and that it is a fraud in law upon the creditors of the assignors who have not executed it, for these causes:

1st. Because there is no proof of execution by the assignors, trustees, or any of the creditors, nor of the delivery of the property conveyed.

2d. Because there is no specific description of the lands, personal estate, notes, accounts, &c. and the debts proposed to be secured.

3d. Because it gives a preference to some of the creditors over others.

4th. Because it is in itself the making of a bankrupt law, for the benefit of the assignors.

We are inclined to the opinion that the deed, for any thing appearing on its face, is valid at law, without an execution of it by any of the creditors of the assignors. It conveys all their property, without an estimate of its value, for the payment of three hundred dollars to Samuel Clark, and then to such other creditors as might execute it; no act is required to be done by Clark, to entitle him to the benefit of the deed, but as to him, the deed becomes immediately operative on its execution by the assignors. Nor is it considered of the essence of the deed that the trustees should have executed it, or assented to the trust; if they had refused, equity could appoint others in their stead, with all powers which the deed conferred.<sup>a</sup>

<sup>a</sup> 7 Whea. 556.

But the deed purports to have been executed by the assignors, assignees, and some of the creditors; and were it necessary, we might presume an execution by all the parties whose names appear, and more especially by the creditors, as it is for their benefit.<sup>b</sup> It is however unnecessary to resort to presumption, for the answer of the gar-

<sup>b</sup> 2 Kent's  
Com. 421.  
Pease v. Owen, 2 Hayw.  
234.

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.

nishees must be regarded as strictly true; and even if the deed be disregarded, no judgment can be rendered against them on their answers, because they state they have been advised that the assignors have transferred their claims against them. We must take the assignment to have been legal, unless its illegality appeared from the answers, or from the deed accompanying them, or had been made manifest by the finding of a jury on an issue taken on the answers. This doctrine was settled by this Court in *Allen v. Morgan*, at January term, 1827. And as no issue was taken on the answer of the garnishees, if it were necessary, from the circumstance of the deed appearing to have been executed, we would presume a delivery of the property conveyed, as it recites the fact. But here the doctrine of presumption need not be invoked, for if no delivery has been made, the rights of the assenting creditors cannot be prejudiced, unless they dispensed with it, or did some other act from which fraud is inferable. No act of the trustees can affect the assenting creditors, unless they in some degree contributed to it; because the trustees are only agents for the assignors.<sup>a</sup> The facts so far as developed by the record, discover no improper conduct, by the assenting creditors.

\* 7 Whea. 556.

With regard to the generality of description of the property conveyed, and of the debts intended to be secured, this cannot be held to invalidate the deed. However proper it might be to require a specific description of property, where a conveyance is made for the security of a particular debt, that it might appear that the security was not largely disproportioned in value to the amount of the debt, we should hesitate before we could say, that that circumstance, would, of *itself*, avoid such a deed. But where a debtor conveys his entire property for the benefit of all his creditors, we are unable to discover any sensible reason why he should particularize each object. As every thing is given, it will not be, to be distinguished from other property; and as it is granted for the payment of all the creditors, it cannot be objected that it is greatly disproportioned to the debts of those who have come in under the deed. Nor have we been able to discover any reason why the lands conveyed should be described by metes and bounds; they can be identified by the title papers, which it is presumable were in the possession of the assignors; and when the trustees have made out a title in the assignors, they can use the deed as evidencing an assignment of that title to them-

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.

selves. But even suppose the title would not be good at law, the powers of Chancery might be invoked against the assignors, by a purchaser from the assignees, and a decree obtained for a more perfect conveyance. It is even enough if the deed passes the equitable interest in the lands; it is now well settled that such interests shall at law be protected from attachment.

It is a well ascertained rule of law, that the right of the debtor to control his property is full and complete, and not subject to restraint by law, until the creditor acquires a lien upon it.<sup>a</sup> In countries where bankrupt laws obtain, a different rule of jurisprudence prevails; it is there held, that the effects of the bankrupt must be distributed among his creditors according to the provisions of a certain law, and that a distribution upon any other scale, would be a fraud on it, and consequently void.

The right of the debtor to dispose of his property being then uncontrollable by law, where there is no lien already attaching in favor of the creditor; it follows necessarily that he may secure the debt of one creditor in preference to another, and that the security given cannot be prejudiced by the insolvency of the debtor, if the creditor has not acted improperly in obtaining it.

That the deed is the making of a bankrupt law, for the benefit of the assignors, is an argument which we think cannot be well founded. Before, with any degree of justice, it can be assimilated to a law, it would be proper to shew that it was compulsory upon the creditors: this we apprehend will not be insisted on. The creditors may or may not assent to its provisions; if they yield their assent, they must be paid as it directs, if they withhold it, they can only look to the property conveyed after the debts of the assenting creditors are satisfied. This objection, we conceive, acquires no weight from the fact, that the assent of the creditor operates a release of the liability of the assignors from payment, on a deficiency of property for that purpose; for, as already remarked, he is not forced to assent. It seems to be the better opinion, that a debtor may indirectly exercise a coercion over his creditors, by requiring them, if they take a benefit under the deed, to give a release.<sup>b</sup> The commentator refers to authority, and none that we have seen maintains the converse of the position.

The counsel of the plaintiff insist, that the assignors had no greater control over their property, without the jurisdic-

a Hatch v. Smith, 5 Mass. 42, Putnam v. Dutch, 8 Mass. 287, Widger v. Haskell, 5 Mass. 14, Stevens v. Bell, 6 Mass. 339, Thomas v. Goodwin, 12 Mass. 14, Cushing v. Gore, 15 Mass. 74, Hendrick v. Robinson, 2 John. Ch. R. 283 M'Hemmon v. Ferreis, 2 Johns. 72, Murray v. Riggs, 15 J. R. 571, Austin v. Bell, 20 John. 442, Wilt v. Franklin, 1 Bin. 502 514, Marbury v. Brooks, 7 Wren. 556.

b 2 Kent. Com. 421.

tion of New-York, than the law has in England over the estate of a bankrupt. In answer to this argument, it may be proper to shew how far a sequestration, by a commission of bankruptcy, operates upon the estate of the debtor. The law in relation to bankruptcy is municipal in its character, owing its force and operation to the Legislature of the particular country, and not dependant upon any rule adopted by the community of nations for the adjustment of commercial intercourse; hence it follows, that its influence is limited to the government that adopts it, and that it cannot operate upon the citizens of another nation, that has had no agency in its enactment, and can never have assented to it, as forming rules for judicial action within its sovereignty. In this view we are well sustained.<sup>a</sup> Lord Kames, in his "Principles of Equity," <sup>b</sup> in discussing the question as to the effect and extent of the English bankrupt laws, says, "law cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance, when justice requires it to be granted, all that the Legislature can do, is to be themselves the disposers: and it is evident that their deed of conveyance cannot reach any subject, real or personal, but what is within their territory." In *Harrison v. Steeny*, <sup>c</sup> Chief Justice Marshall says, "the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States." Other authorities are to the same point.<sup>d</sup>

Having shewn the extent of the influence of an assignment by positive law upon the estate of the debtor; we propose next to inquire, whether there be any analogy between such an assignment, and one made by the debtor himself. In respect to the right of the owner to control his property, it is assumed as a correct rule, that, in time of peace, personal property has no locality; and that therefore it is competent for him to dispose of it by any legal conveyance, though it may at the same time be without the country of his residence, or the place where the conveyance was executed. A different rule might seriously affect trade, and would require an inhibition upon the transfer of property to an impolitic extent. Lord Kames, in his "Principles of Equity," <sup>e</sup> speaking of the distinction between a transfer by the party himself and of a commission of bankruptcy, says "the former has no relation to place; the latter, on the contrary, has the strictest relation to place, and reaches not lands or moveables *extra territorium*." Chancellor Kent, in *Holmes v. Remson*, <sup>f</sup> and Chief Justice Par-

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.

<sup>a</sup> *Mandersly v. Park and Beckwith*,  
1 H. Bla. 680.  
<sup>b</sup> *Homes v. Remson*,  
20 John. 254,  
Platt's opinion.  
<sup>c</sup> 4th Edit 573.

<sup>e</sup> 5 Cranch  
283.

<sup>d</sup> *Milner v. Moreton*,  
6 Bin. 353.  
*Taylor v. Gear*, 1 Kirby  
313, *Wallis &c. v. Patterson*, 2  
Harris and  
M'Henry 463,  
13 Mass. 146,  
2 Hayw. 24,  
12 Whea. 213,

<sup>e</sup> 4th Edit. 573

<sup>f</sup> 4 John. Ch.  
R. 460.

JULY 1839.

Robinson  
v.Rapelye and  
Smith.

a 3 Mass. 577.

sons, in *Goodwin v. Jones*,<sup>a</sup> both agree, that such is the effect of a conveyance by act of the party; and contend, that a conveyance by act of the law operates co-extensively with the law. In relation to lands, they may be conveyed by the employment of those ceremonies which the *lex rei sitæ* has made essential to a transference of right; though they be not situate in the country where the conveyance is executed. This proposition seems to us legitimately to result from the idea of private property, and a conclusion flowing from what we have said in relation to personal estate.

It is not pretended to question the right of any country to regulate, by positive law, the disposition of personal property found within its limits, so as to give a preference to its attaching creditor over the assignees of a non resident debtor. Such a right we believe to exist when it has not been abolished by the restrictions of fundamental law. But when this right has never been exercised, it is compatible with the rights of sovereignty for the legal forums of every country, to give effect to a conveyance by act of the party; and in point of law, they have no discretion in refusing their aid. We have no statute which sequesters the estate of the non resident debtor, though insolvent, for the benefit of the resident creditor, and cannot therefore deny to the deed the effect it proposes.

The reason employed, sustained as it is by authority of the highest respectability, we think most manifestly shews, that the parallel insisted on between the two descriptions of conveyance, cannot with justice be drawn: the one is voluntary, the other *in invitum*; the one is the act of the party, the other the act of the law; the one reaches the estate of the assignor wherever it may be, the other only where *intra territorium*.

Having patiently investigated the case, we are of opinion, that the Court below decided correctly in refusing a judgment against the garnishees, and the judgment must therefore be affirmed.

By JUDGE SAFFOLD. The questions presented by the various assignments of error are: 1. Does sufficient evidence of the due execution of the deed of assignment appear to have been offered to the Circuit Court, to defeat the plaintiff's attachment? 2. Is the deed on its face legal and valid according to its stipulations; or by legal construction, is it fraudulent and void? No evidence is furnished of the execution of the instrument, except by the assignors; their

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.


execution is certified by a notary public, but neither the notarial certificates, or any other shewing, testifies any thing respecting the signing or sealing by either of the assignees or creditors. It is true, the deed transmitted to the garnishees, perhaps by mail, and by them shewn to the Court, purports to have been executed by two of the assignees and some twenty creditors. It cannot, however, be overlooked, that the garnishees admit their indebtedness to the defendants, and state they received notice from the persons named as assignees, of the transfer by deed as above described, but they do not profess any knowledge of the genuineness of the deed; or claim any interest in it. The state of the question is therefore essentially different from what it would be in a case where the assignors are summoned as garnishees, and claim title in themselves, either individually, or as trustees for the benefit of creditors, and consequently deny any indebtedness to the defendants in the attachment. In a case of the latter description, the answer not only denies that any thing is owing, but expressly, or by implication, avers the due execution of the deed. Under such circumstances, the plaintiff must acquiesce, or, pursuant to the statute, *deny the truth of the answer on oath*, and take issue upon it.<sup>a</sup> But in this case, an issue could not with propriety have been joined on the facts of the answer; for it averred no material fact, except the admission of their indebtedness, and it would have been perfectly nugatory to contest the statement that a deed as described had existence, either genuine or spurious, and that the garnishees had notice of it.

<sup>a</sup> Laws of Ala.  
17.

Evidence of the execution by the assignees, may be dispensed with, and the fact of their assent presumed; or if it be otherwise, Chancery is competent to remove the difficulty by compelling them to appropriate the funds according to the directions of the trust. If the assignment was absolute for the payment of all or any portion of the creditors, without requiring their release or assent as a condition precedent, then as they could have no inducement to refuse, their assent might be presumed, as was done in the case of *Brooks v. Marbury*.<sup>b</sup> But where the act of becoming parties to the deed by executing it is expressed as the only condition on which they could claim any interest under it, neither the case referred to, or, as I think, any others cited, give any sanction to the doctrine, that their assent is unnecessary to the validity of the assignment. And as I view the subject, the assent of at least a

<sup>b</sup> 7 & 11 Whea.



JULY 1829.  
  
 Robinson  
 v.  
 Rapelye and  
 Smith.

number of creditors whose demands together, bear a reasonable proportion to the value of the property assigned, is indispensable to the validity of the deed; otherwise it is perfectly evident, the grossest fraud may be committed with perfect impunity.

<sup>a</sup> 1 Monroe's  
 R. 104.

In a case decided in the Supreme Court of Kentucky, as late as 1824, *M<sup>c</sup>Kinley v. M<sup>c</sup>Clombs*,<sup>a</sup> this principle was maintained in terms far less qualified. There, a deed of trust had been executed by Grimes of all his estate real and personal, expressing to be in consideration of five shillings, and for the payment of his creditors, without naming any of them; neither of the trustees were creditors, nor did it appear that the creditors were consulted, or that they consented to the conveyance. A bill was filed by a creditor against the trustees, to set aside the deed, on the ground of fraud. Chief Justice Boyle, in delivering the opinion of the Court, said, "notwithstanding the trustees allege in their answer that they accepted the trust at the request of some of the creditors, yet there was in the cause no proof of the fact, and were it admitted to be true, it could not affect those creditors who had not made such request, or otherwise given their consent to the conveyance." He remarks further, "it is to be sure reasonable, that the creditors who consent to a conveyance of this sort, should be bound thereby, and ought not to be permitted afterwards to object to it; but it is plain they could not bind other creditors who did not consent to the conveyance." He adds, "the deed of trust must therefore be assumed to be made by Grimes to strangers, and not to creditors, for the payment of his debts, and such a deed is merely voluntary and without consideration." That the consideration of five shillings, expressed, would be considered as merely nominal, and could affect the interest of no one but the assignor himself; that the deed as to purchasers and creditors, must be considered as fraudulent and void. This he said was the doctrine of the English books, under the statute of Elizabeth, of similar import to the statutes of Kentucky, against frauds and perjuries. The same may be said of the statute of this State and probably of New-York; and it may also be remarked, as was done in the case of *Sands v. Hildreth*,<sup>b</sup> that the statutes for the prevention of frauds in the usual form, have been universally considered as expositions of the common law. The assignment in the case thus reported, appears to me to be far less exceptionable than the one under consideration; and if the doctrine as

<sup>b</sup> 14 John. 496.

JULY 1889.

Robinson  
v.  
Rapelye and  
Smith.

---

maintained in that case be correct, it is impossible that this assignment can be valid against the rights of dissenting creditors. There, the creditors, to claim under the deed, were not required to release their demands against the true debtor; here it was the only condition on which they could have any claim; there the trustees answered on oath that they accepted the trust at the request of some of the creditors; here a paper is produced purporting to have been signed and sealed by a few of the presumed numerous creditors, and this is the only evidence of their assent, without a particle of proof of the genuineness of their signatures.

It is true the sum of \$300, appears to have been appropriated by the deed to the payment of Clark, of Augusta; the language is rather ambiguous whether this was absolute, or on the condition prescribed for the other creditors, that he should execute the deed; but admitting it was absolute, can it be tolerated for a moment that an assignment in trust for the payment of several hundred thousand dollars, can be preserved from the fraudulent taint by a specious pretext securing the contemptible sum of \$300? The schedule annexed to the deed, purports to contain an inventory of only the favorite creditors, and exhibits debts in their favor, to the amount of about \$200,000!! Whether any of these debts have a real existence, or are merely fictitious, is equally destitute of proof, or even an affidavit by the garnishees, or any of the parties to the deed, or other person. It may, however, be assumed against those claiming under the deed, from the amount of debts inventoried, and various other indications, that this was one of the most extensive mercantile establishments in the United States. But whether the estate purporting to be assigned was of the value of \$100,000 or a \$1,000,000, is equally uncertain. What kind of property, what proportion of land, or personal estate, or where it is to be found, is left equally doubtful. No article of property is described, nor is the name given of a single debtor to the firm.

The execution of the deed by the creditors, or their assent otherwise given to its terms, would constitute a waiver of these objections as to them; but the position I assume, is that this deed is not shewn to have been assented to by any creditor: also, if it were shewn that the creditors who purport to have joined in the execution, have in fact done so, and that they were *bona fide* creditors for the respective sums mentioned, yet as their just demands may not equal half the value of the estate, and as the assignors have

JULY 1829.

Robinson  
v.  
Rapelye and  
Smith.

---

avoided giving any account of it, and as none can claim under the deed, except such as have joined in the execution of it, and thereby released their claims on the firm, no others can be affected by it. It is admitted that this plaintiff, and many other creditors, have refused to execute the deed; the consequence of which must be, that if this deed is held operative against them, their claims are entirely defeated.

2. It remains to be considered whether the deed, according to the terms it purports, is legal and valid; or by legal construction is it fraudulent and void?

11 Wheat.  
78.

The late decision of the Supreme Court of the United States, in the case of *Brooks v. Marbury*,<sup>a</sup> before alluded to, and which is urged on both sides of the question, does not fully embrace the doctrine, but as far as it goes, is against the validity of this deed. It admits the principle which has been often sustained, that a debtor in failing circumstances or otherwise, may lawfully prefer one creditor or any number of creditors to others, either by the direct sale of property to them, or by an assignment in trust for their use, provided, it be done in good faith, and the preferred creditors "give their assent at the time of the execution, or if they subsequently assent in terms, or by actually receiving the benefit of it." In that case, the assignment was made to secure payment of debts created by the forgeries of the assignor, the real existence of the debts was fully shewn, the property was described with reasonable certainty, the preferred creditors were to be fully paid, after which the residue of the estate was absolutely appropriated for the benefit of the other creditors generally, without the condition of a release. It was understood, however, there would be no residue, and if the deed was valid, the debts due the favorite creditors would be paid, to the exclusion of all others; if invalid, the whole proceeds must go to the attaching creditors, in the order in which they stood, to the exclusion of those for whose benefit the deed was made, and others. Under these circumstances, Chief Justice Marshall, said, "it was a mere question of legal preference, unmixed with any equitable considerations whatever." He also said, "deeds of trust may and have often been made for the benefit of persons who are absent, or even for persons who are not in existence, and that the assent of the persons for whose benefit they are made, has never been required as preliminary to the vesting the legal estate in the trustees. He adds, however, that if the pre-

JULY 1880.

Robinson  
v.  
Rapelye and  
Smith.

---

ferred creditors had refused their assent, the assignment would thereby have been avoided; but that "real creditors, are rarely unwilling to receive their debts from any hands which will pay them; and no such unwillingness can be gratuitously ascribed to the holders of forged notes."

In reference to the expressions of the Chief Justice, as to the necessity of the assent of the *cestui que trust*, the same remark applies, that was used by him in the same case in allusion to certain remarks of Chancellor Kent, "that they must undoubtedly be understood in reference to the case in which they were used." His language entirely excludes the idea that in no case was the assent necessary to the validity of the deed, but he gives ample reasons why the assent should be presumed in that case; that as the preferred creditors were the innocent holders of forged notes, they would doubtless be willing to receive payment from any source. And compared with this case, other reasons equally strong may be added. The condition of their assent was not a release of all claims on the person of the debtor, or such parts of his estate as might be fraudulently concealed, or which he might afterwards acquire, as is the case here. And in that case, the assigned property being designated and described, the creditor could scrutinize the assignment and ascertain the faith in which it was executed. Here they are left without the slightest estimate or description of the amount, kind or locality of the assigned property, except that it is all the personal estate, claims or demands, and all the lands in Georgia and Alabama, which the firm owned jointly, but not individually. Hence a creditor who might wish to examine the motive for the assignment, and the prospect of payment under it, so as to make his election, whether to join in the execution of the deed or not, must roam through the United States, without the usual and necessary means of making the discovery.

And in this place it is necessary to notice what I consider a prominent objection to this deed; it expressly excepts, from its operation, all the separate or individual property, belonging to each of the persons composing the firm. Who can say, their separate property does not exceed the value of their joint estate, or that it does not bear a large relative proportion to it; or that they did not preparatory to this assignment, use the precaution to have no individual debts, and increase their separate property out of the joint stock? It is a rational presumption that their separate property is sufficient to constitute a reservation, which, if expressed in

JULY 1839.

Robinson.  
v.  
Rapelye and  
Smith.

the deed, would exhibit the most glaring fraud. Nor should the fact escape notice, that they assign only such lands of the firm as lie in the two States; what quantity of real estate they may jointly own in the State of New York, where they reside, or elsewhere, is in no way shewn or estimated. The presumption is strong, that there was a deep and secret motive for this vague, yet efficient designation.

By the rule of decision which has uniformly prevailed in Connecticut, assignments less exceptionable than this, have been adjudged fraudulent and void, as to creditors who do not assent to the terms. The principles of a case reported in 4 Day, 146, were these, "A., being in failing circumstances, executed a deed of assignment of certain credits to B. in trust, for the payment of all A's creditors, in proportion to their respective claims. Two schedules were annexed, the first specifying the names of several creditors, and concluding thus: "and others, to the number of about twenty creditors." The other specifying several debtors, with the amount of their respective debts, and concluding thus: "and many more to the amount of more than \$10,000." That assignment was made *bona fide*, and due notice given to the creditors. The creditors named in the schedule, had no knowledge of the assignment at the time it was made, but none of them afterwards dissented, except C. who did dissent. B. was agent to a number of the creditors; he accepted the trust, and proceeded to make collections. It was held, that the assignment was void in law, and that C. was entitled to recover the credits assigned by process of foreign attachment."

In the Courts of New-York, a doctrine has prevailed more favorable to assignments in trust for the payment of preferred creditors, than in any other tribunal of equal authority. But even there, I think the principle has not been carried so far as to sustain this deed, supposing it in fact to have been executed by the persons who purport to have signed it as creditors.

\* 14 John. R.  
458.

In the case of *Hyslop v. Clark*,\* a schedule was annexed to the deed containing all the property conveyed with a particular description thereof. The deed contained a stipulation, that in case any of the creditors should refuse to release their demands against the assignors, then, in further trust, to pay such of their creditors as they should appoint; certain of these creditors refused, and it was held that the trust failing as to them, resulted for the benefit of

the assignors; that the deed was therefore void by the statute of frauds, as to other creditors; and being void in part, was void in the whole on the ground, that it tended "to delay, hinder and defraud creditors." The same I conceive may be said of this deed.

It was, however, held in the case of *Murry v. Riggs*,<sup>a</sup> that the deed of assignment may exclude from its benefits such creditors as neglect or refuse to assent to the assignment within a limited time, throwing the distributive shares to which they would have been entitled, into the general mass for the benefit of other creditors provided for by the deed.

But in a subsequent case, *Austin v. Bell*,<sup>b</sup> Spencer, Chief Justice, reviewing the case of *Murry v. Riggs*, remarks, that Chief Justice Thompson, in delivering the former opinion, observed that "for any thing appearing, all the creditors of Murry & Co., the assignors, were satisfied with the assignment, and the provision therein made for the payment of their debts." In this case, the reverse is the fact. He went on to say, "this is an important feature in which the case of *Murry v. Riggs*, was distinguishable from that of *Clark & Hyslop*, and that Chief Justice Thompson in the same case assented to the decision in *Hyslop v. Clark*, and it could not be inferred he intended to overrule it by any thing said in the other case. The deed in the case of *Austin v. Bell*, was executed by persons composing a mercantile firm, to trustees, for the payment of the debts of the firm. It conveyed all their estate, joint and several, real and personal, their wearing apparel and household furniture excepted; and also the debts and demands due to them, either jointly or severally; the directions of the trust were among others, that the creditors named and classed in a schedule annexed, should be paid in the order in which they were classed; provided, they should within a limited time, become parties to the deed by executing the same; and upon the further trust, that in case any of the creditors named should not, within the time, become parties to the assignment, then the grantees should pay to the grantors, the proportion of such creditors who neglect or refuse. The deed also contained a release similar to the one before us. Very few of the creditors executed the deed, and among those who refused were the creditors whose claim was in contest. Some, however, did execute, which afforded the deed all the aid that can be derived from the assent of one or a few of numerous credi-

JULY 1880.

Robinson  
v.  
Rapelye and  
Smith.

2 15 John. R.  
571.

b 20 John. 443.

JULY 1839.

Robinson  
v.  
Rapelye and  
Smith.

tors. The Chief Justice, in that decision observed, that "without in the least impugning the doctrine, that a man in debt has a right to give a preference to creditors, I am bound to say, that a deed which does not fairly devote the property of a person overwhelmed with debt to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder or defraud creditors of their just and legal actions." It is admitted, this decision was mainly influenced by the provision in the deed, that the proportion of the dissenting creditors should be paid to the assignors in the event of their refusal. But if all assented, there was no reservation, so that it could only be created by the act of the creditors in refusing their assent, and the whole of the property held jointly and severally was conveyed. It was not subject to several objections applying to this: here is shewn to have been an absolute reservation of all their separate property and all the lands of the firm, except such as are situated in Georgia and Alabama; besides the implied reservation of whatever residue may result from the refusal of part of the creditors, to execute the deed, or of the whole, if all had refused.

13 Mass. R.  
146.

The Supreme Court of Massachusetts, in the case of *Ingraham v. Geyer*,<sup>a</sup> decided, that an assignment in trust for such creditors, as should within a certain time become parties, and release their demands, is void as against the dissenting creditors.

On the other question raised in the argument, whether a voluntary assignment for the benefit of creditors valid by the *lex loci*, can affect the rights of creditors in another State or nation, than where made, I decline the expression of any opinion at present, as it could avail nothing in this case, and is considered by many of the first jurists as an important, and unsettled question of international law.

But for the reasons that the deed is not shewn, or in any manner averred to have been executed by either of the assignees or creditors; that the plaintiff and many other creditors have refused their assent, which was required to entitle them to any interest in the deed, and could only be given on terms of releasing their demands against the debtors, that all the individual property of the debtors, as well as any real estate owned by them jointly, except in the two States, is reserved, and because no estimate, inventory or

other description is given of any of the property, I am of opinion, the deed as presented, is in law fraudulent and void, and that the judgment below should be reversed; consequently, I dissent from the opinion of a majority of the Court.

JUDGE PERRY also dissented.

Judgment affirmed.

THE CHIEF JUSTICE having presided below, did not sit.

JULY 1830.

Robinson  
v.  
Rapelye and  
Smith.

### LUCAS V. HICKMAN.

It appears that in this State, writs of *ne exeat* may be properly granted in the following cases:

1. Where the demand is exclusively equitable, whether a sum certain be due or not, and the defendant is about to remove beyond the jurisdiction of the Court.
2. Where Courts of Law and Equity have concurrent jurisdiction, the defendant being about to remove, and where bail has been not obtained, it will be granted in aid of the action at law.
3. Where the two Courts have concurrent jurisdiction, and no action at law has been commenced, but suit in equity instituted; the removal of the defendant will be restrained.
4. In cases of extreme necessity, and where it becomes necessary to prevent a failure of justice. But as to this last, *quære*.

JOHN R. LUCAS, filed his Bill in Equity, in Madison Circuit Court, in August, 1827, against John P. Hickman, for a *ne exeat*. He set forth that in 1819, Pope and Hickman as copartners, became indebted to the firm of Nance & Co. in \$6662, by a note made by them payable to J. Brahan, and indorsed in blank by Brahan; that the note was delivered to Nance & Co., and that afterwards the complainant acquired the equitable interest in it. That \$6408 of said note remaining unpaid, the complainant entered into a negotiation with Pope, as the representative of Pope and Hickman, for the payment of the residue, and agreed to receive in payment a note made by S. D. Hutchings & Co., and Turner, as makers, and of E. Harris as indorser, for the same sum. That such a note was received by him as a genuine note, he relying solely on the solvency of Turner, as one of its makers; that when this note became due, payment was refused, and due notice given to the supposed indorser; that suits were immediately brought against the supposed makers and indorser; that Hutchings died insolvent, Bradford his partner left the State insolvent; that Harris likewise left the State insolvent; that



JULY 1839.

Lucas  
v.  
Hickman.

Turner pleaded that he never executed the note, and a verdict and judgment were thereupon found in his favor; that the complainant is informed and believes Harris's name also to be forged. That Pope, for Pope and Hickman, were notified of all the proceedings had on the substituted note; that in January, 1823, a suit at law was commenced in the name of Nance, & Co. for the use of the complainant, against Pope and Hickman, to recover the amount due, in which process was executed on them, and which is still pending; that Pope at the commencement of this suit lived in Madison county and was insolvent, but that Hickman then resided in Lawrence county, and was amply able to satisfy the amount sued for; that complainant under those circumstances deemed it unnecessary to require special bail of either of them, and that at law he cannot now obtain it; that Pope is still insolvent, and that Hickman is in the act of removing himself and property to the State of Tennessee, having already removed himself and family, and a large portion of his personal estate, that he has sold the greater portion of his real estate, and is now present, making arrangements to remove shortly the remainder of his property, declaring his intention to remove entirely, &c.; and that the complainant, unless he obtains the aid of this Court, will not be able to enforce the recovery he is entitled to, by any process in this State; and thereupon he prays a writ of *ne exeat* against Hickman, to restrain him from leaving the State, unless he give security for his personal appearance to answer the judgment, &c. The writ was granted in vacation, and Hickman gave security.

At November term, 1827, the defendant prayed the Circuit Court to discharge him, and on his motion the Bill was dismissed with costs. This decree is here assigned for error by Lucas.

KELLY and HUTCHISON for the appellant, argued, that the ancillary power of Chancery was properly exercised in this case, in granting the *ne exeat*; that in this country, it is a remedial and not a prerogative writ; that it has long been allowed on equitable demands in Chancery, in analogy to bail at law, <sup>a</sup> and also where the demand is legal and equitable. This is no hardship, because the party might have been held to bail at law, and can as easily give security on the *ne exeat* as the bail. <sup>b</sup> It has been allowed in aid of a Court of Law, to prevent a failure of justice, where the defendant and his bail were about to remove with their property beyond the reach of an execution, before judg-

<sup>a</sup> 1 Atk. 552.  
<sup>2</sup> Atk. 409. 5  
 Ves. jr. 578.  
 Ib. 91, 96. 8  
 Ves. jr. 593.  
 1 Ves. and B.  
 129.  
<sup>b</sup> 3 John. Ch.  
 R. 412. 1  
 John. 1.

ment could be had. <sup>a</sup> It has also been allowed after judgment, and of course where the demand was purely legal. <sup>b</sup> This shews that the rule confining the remedy to demands, technically equitable, is not inflexible. Our statute of 1823, <sup>c</sup> enacts, that the *ne exeat* may issue, not only where a sum is due, but where the complainant has an equitable claim or demand. The act of 1807, <sup>d</sup> provides, that "it may issue when the case may require." In the present case, the suit at law was brought before the passage of the act of 1827, allowing bail to be taken at law after suit brought; that act is restricted to cases to be brought after its passage, so there was no remedy but by the application to the Court of Chancery.

JULY 1820.

Lucas  
v.  
Hickman.

<sup>a</sup> Porter vs.  
Spencer, 2  
John. Ch. R.  
169.  
<sup>b</sup> 3 P. Wm's.  
812.  
<sup>c</sup> Acts of 1823,  
p. 11.  
<sup>d</sup> Laws of Ala.  
487.

HOPKINS, for the defendant.

By JUDGE CRENSHAW. Where the action is purely legal, as ancillary to an action at law, it may be laid down as a rule generally correct, that equity will not interfere.

In the case of *Seymour v. Hazard*, <sup>a</sup> it was settled that the writ of *ne exeat* will not be granted for a debt due and recoverable at law; and that the writ was applicable only to equitable demands due in the nature of a debt.

<sup>a</sup> 1 John. Ch.  
R.

In the case of *Porter v. Spencer*, <sup>f</sup> the same principle was recognized as being the uniform law, at least down to the time of Chancellor Eldon. In that case it is said that the writ would be denied if the demand was actionable at law; though the party was about to remove with his effects beyond the jurisdiction of the Court.

<sup>f</sup> 2 John. Ch.  
R. 169.

Since the time of Eldon however, the law seems to have undergone some change, and it is now well settled in the English Chancery, that in cases where the Courts of Law and Equity have concurrent jurisdiction, and the defendant has not been held to bail in the action at law, the writ will be granted in aid and to give effect to the action at law.

The case of *Porter v. Spencer*, was indeed a peculiar and strong one, for the interposition of a Court of Equity. The action at law had been brought to recover the balance of an account; the defendant had been held to bail, and he and his bail were about to remove from the State permanently, without leaving any property behind. The Chancellor hesitatingly granted the writ, on the ground of the necessity of the case, and to prevent a failure of justice.

I think it obvious, that the Legislature of this State,

JULY 1829.

Lucas

v.

Hickman.

by the act of 1823, did not intend to authorise the granting of writs of *ne exeat* in cases where the debt or demand was purely legal.

The ninth section of the act provides "that it shall be lawful to grant writs of *ne exeat*, not only in cases where a sum of money is due, but also where the complainant has an equitable claim or demand against the defendant."

Before the passage of the act, it must have been considered that the writ of *ne exeat* could issue in cases only of an equitable nature, in which it was also necessary to swear to a sum certain; it seems to have been doubtful whether the writ could issue where the party could not swear that a sum certain was due, though the demand was equitable in its nature. This doubt the Legislature intended to remove by the enactment of the law; and now authorises the writ to be granted in all cases of an equitable nature, whether a sum certain be due or not.

From what has been said, the following propositions are clearly deducible: 1. In cases where the defendant is about to remove beyond the jurisdiction of the Court, and the demand is exclusively of an equitable nature, whether a sum certain be due or not, the writ of *ne exeat* will be granted, on a sufficient affidavit. 2. Where the Courts of Law and Equity have concurrent jurisdiction, if the defendant is about to remove, and has not been held to bail in the action at law, the writ will be granted in aid, and to give effect to the action at law. 3. Where the two Courts have concurrent jurisdiction, and no action has been commenced at law, but suit has been instituted in equity, the writ will be granted if the party is about to remove. 4. Where from the extreme necessity of the case, and to prevent a failure of justice it becomes necessary, it also appears that the writ will be granted. But this fourth proposition, though it seems to be sanctioned by authority, I have some hesitation in admitting to be law. "Extreme necessity, and to prevent a failure of justice," appears to me to open a door too wide, even for the Chancellor's discretion, and which in many instances may be liable to abuse.

In the case before us, it does not appear that Hickman was removing with an intention of evading justice, or of defeating the operation of the judgment which might be obtained at law; and though removing out of the jurisdiction of the Court, it yet may have been his intention to pay the debt after the cause should be entirely settled. His removal to a place not distant, and where it would be near-

ly as convenient to pursue him with the judgment, as to bring suit here against his bail, cannot, of itself, furnish sufficient ground for equitable interposition.

In the foregoing opinion, the Court are unanimous.

Decree affirmed.

JUDGE WHITE presided below, and did not sit.

JULY 1839.

Lucas  
v.  
Hickman.

### HALLETT V. ESLAVA, *et al*

1. Previous possession of lands is sufficient evidence of title to authorize a recovery, but only in cases where there is no adverse documentary title.
2. A certificate of confirmation of title to lots in Mobile, issued by the Register and Receiver of the Land Office, under the act of Congress, is evidence of a good title in the grantee.
3. Such certificate of title, accompanied with possession, will overreach a title evidenced by a previous possession merely, though such possession be of fifteen years standing.
4. In trespass to try titles, a defendant may shew that a third person has a better title than the plaintiff, and it will be a sufficient defence.

MIGUEL DE ESLAVA, JEROME ESLAVA, JOAQUIM ESLAVA and THOMAS F. TOWNSLEY, brought an action of trespass to try titles to recover possession of a certain lot of land in Mobile, and damages for the detention by Thomas L. Hallett, who had it in possession. At March Term 1828, of the Mobile Circuit Court, the cause was tried, and a verdict and judgment were obtained by the plaintiffs against Hallett the defendant, for the lot and \$300 damages and costs. Hallett excepted to the instructions given by the Court on the trial, and sued his writ of error to this Court to reverse the judgment.

By the Bill of exceptions it appears, that the plaintiffs offered no documentary or paper title, but relied on a right under Don Miguel Eslava, their ancestor, under whom they claimed. They proved, that in 1803, the commandant of the Fort of Mobile caused buildings to be erected on the lot in controversy, and that about the year 1804, he told the carpenter who built the houses for him, that he had sold the premises to Don Miguel Eslava. There was no other evidence of a sale of the premises to him. The commandants of the Fort and Town of Mobile, continued successively to the number of four, as they succeeded each

JULY 1829.

Hallett

v.

Eslava, et al.

other in the command, to occupy the premises as their quarters, until 1813, when the United States took possession of Mobile, at which time General Wilkinson, under whom possession was taken, occupied the same as his quarters, during the time he stayed at Mobile. There was no evidence that any of the Spanish commandants had rented the premises of Don Miguel Eslava. It was proved however, that he had several times purchased lumber to repair the dwelling house, but he was at that time the public commissary, and also purchased lumber to repair the Fort and other public buildings; and it was a part of his duties as commissary, to furnish quarters to the commandants and soldiers. The plaintiffs also proved that General Wilkinson appointed a Lieutenant, to meet an officer of equal grade appointed by the Spanish commandant, and to receive from him the public property; and that the premises in dispute were not shewn or delivered as public property. After the change of Government, Don Miguel took possession of the premises by renting them to different tenants, and he remained in possession till 1819 or 1820.

The defendant claimed under the heirs of Robert Farmer, who were proved to be living, and for whom it appeared he had been put in possession by the Sheriff of Mobile county; and in support of their title, produced a certificate of a survey made for them, dated "Surveyor's Office, Land District East of the Island of New Orleans," dated eighth of May, 1824. This certificate was signed by Silas Dinsmoor, Principal Deputy Surveyor, and recites, that in conformity with a certificate No. 15, Report No. 7, from the board of commissioners at Jackson Court House, he had surveyed the lot in question for the heirs of Robert Farrar, and annexes a plat of it. It also recites that a claim for the same lot was set up by the heirs of Eslava. He further produced a certificate of confirmation issued by the register and receiver, dated "Land Office at Augusta, Mississippi, District of Jackson county, March 28th. 1827," certifying that in pursuance of the act of Congress passed the 8th. of May, 1822, entitled "an act confirming claims to lots in the town of Mobile, and land in the former Province of West Florida, which claims have been reported favorably upon by the commissioners of the United States," the claim of the heirs of Robert Farmer had been confirmed, and regularly surveyed as per the plat certified by S. Dinsmoor; and that they were, on application to the General Land Office, entitled to a Patent

for it. Upon this evidence, the Court charged the jury, that if they believed that the plaintiffs, and their ancestor under whom they claimed, had been in possession from 1804, up to 1819 or 1820, that it was such a possession as authorised the presumption of a title in them; and that the said certificate of confirmation of title in those under whom the defendant claimed, was not a paramount title to that of the plaintiffs. This charge is now assigned for error by Hallett.

JULY 1820.

Hallett

v.

Eslava, et al.

ACRE, for the plaintiff in error.

ELLIOTT and CRAWFORD, for the defendants.

By JUDGE COLLIER. The facts shewn by the bill of exceptions require that we should express an opinion; first, upon the nature of the title of the defendants founded on previous possession: second, upon the legality of the certificate offered by the plaintiff: and third, whether the possession of documentary evidence of title gives paramount right.

Evidence of title to real property founded on and deduced alone from possession, is the most unsatisfactory and inconclusive of all other, by which title is made out. Possession cannot, consistently with reason and law, unless sanctioned by the length of time which the Legislature have prescribed as a bar to an action to try titles, give a right to lands, but can only be considered in a case thus circumstanced, as creating a presumption that the title is with the possession. It is believed that a plaintiff can only recover where such proof is not accompanied with, or countervailed by proof of title in another. The presumption which it creates may be destroyed in various ways, by shewing that the title was not with the possession, as that the possession was permitted, or that it was held against the consent of the person in whom the title is. This brings us to consider the second point.

By an act of Congress passed on the 8th. of May, 1822, entitled an act confirming claims to lots in the town of Mobile, &c. <sup>a</sup> when taken in connection with an act of the same date, entitled "an act supplementary to the several acts for adjusting the claims to land and establishing Land Offices in the District East of the Island of New Orleans," <sup>b</sup> power is given to the Register and Receiver at Jackson Court House, Augusta, Mississippi, in default of commis-

<sup>a</sup> Land Laws  
819.

<sup>b</sup> Land Laws  
923.

JULY 1829.

Hallett  
v.  
Eelava, et al.

a Laws Ala.  
248.

sioners specially appointed to confirm claims to lots in Mobile, derived under British or Spanish authority, and upon a claim being reported on favorably, they are authorised to issue a certificate of confirmation to the person entitled, setting forth the nature of the claim, and the quantity of the land allowed. The certificate seems to be sufficiently formal and to have been regularly issued.

By an act of the Mississippi Territory, "all certificates issued in pursuance of any act of Congress by any of the boards of Commissioners, Register of a Land Office, &c. upon any warrant, &c. for any land in this Territory, &c. shall be taken as vesting a full, complete and legal title in the person in whose favor the said certificate is granted, &c. and the same shall be received in evidence as such in any Court in this Territory." The acts of Congress have authorised the issuance of the certificate. The territorial act just recited declares what fact it shall be taken to prove, and for that purpose has made it evidence. It now remains to consider the third point.

The certificate, it is declared by our statute, vests the legal title fully and completely in the grantee. Possession it has been said conveys no title in itself, but is evidence when uninterrupted for a long space of time, that the title is with the possession; the force of which presumption yields to documentary evidence. If then the possession of the ancestor was of a character to authorise the inference that the title was vested in him, that inference must yield to the strength of the title vested by the certificate in the heirs of Farmer. It is unnecessary for us to decide upon the legal effect of the certificate further than we have expressed ourselves. Its conclusiveness as evidence against all persons who claim adversely, or whether the facts and suggestions on which it issues can be enquired into now, are topics which cannot be legitimately adjudicated in this case. We will however remark, that the method pursued under the direction of Congress, of examining and confirming, and rejecting the Spanish and British land claims, seems to have been sustained by the Supreme Court of the United States in *De La Croix vs. Chamberlain*.<sup>b</sup>

b 12 Whea-  
509.

In the action of trespass to try titles, the plaintiff must recover upon his own title, and if he shall make out a *prima facie* case, it is competent for a defendant to shew a better title in a third person. It was therefore legal for the plaintiff to have defended himself behind the title in the heirs of Farmer. It is scarcely necessary to say any thing of

the proof of purchase from the Spanish commandant by the ancestor, as it seems not to have been regarded by the presiding Judge in his charge; we however think that *prima facie*, he had no right to sell. Could the fact of sale be made out by legal testimony, it would be proper to give evidence of a right to dispose of the property before the sale could be made availing, if at all. We are of opinion, from the facts appearing on the record, that the Court should have instructed the jury that the certificate offered by the plaintiff, overbalanced the presumption of title in the defendants founded on the possession of their ancestor.

Judgment reversed and cause remanded.

The CHIEF JUSTICE not sitting.

JULY 1820.

Hallett  
v.  
Eslava, et al.

#### FRYER v. AUSTILL.

1. An execution issued against a principal and security, and a part of the money was by the sheriff made by levy and sale of the principal's effects, but he returned it "no money made," and an alias issued against the security for the whole debt. The sheriff having absconded, it was held that in Equity, the security was entitled to relief, and that the Court had jurisdiction to enjoin for the amount made by the sale.
2. *Quære*.—Can a Common Law Court, in such case, afford relief?

MARTIN FRYER, as administrator of John Fryer, deceased, filed his bill in equity in Monroe Circuit Court, in August, 1824, against Jeremiah Austill, as surviving partner of the firm of Files and Austill, and against John Yancy, former sheriff of Monroe county.

The bill charged that an execution issued from Monroe Circuit Court, in favor of Austill, as survivor, against one Myles, and against John Fryer, for \$336, said John Fryer being the security of Myles in a writ of error bond. That this execution was levied by Yancy, then sheriff of Monroe, on property of Myles, the principal, which he held, for \$136. That he gave no account of this levy and sale, but returned the execution endorsed "no money made;" that after this, Myles died insolvent, and John Fryer died; and that an alias execution had been since issued, and was in the hands of the sheriff of Monroe county, against the estate of John Fryer, for the whole amount of the debt. That Yancy had left the State, so that the complainant could not obtain a remedy at law, by giving



JULY 1829.

Fryer  
v.  
Austill.

him notice of a motion in said Court. The complainant averred a readiness to pay so much of said execution as had not been satisfied, being about \$200; and prayed that the \$136, might be credited to him, &c.; and also for an injunction to stay the collection of that amount, and for general relief. An injunction was granted by Judge Crenshaw, in September 1824, restraining the collection of the \$136, for one month only, to give the complainant an opportunity of serving a notice on one of the defendants, who resided in the State.

At October term, 1824, Austill demurred to the bill, for want of equity; and at October term 1826, a decree was rendered, sustaining the demurrer, and dismissing the bill with costs, on the ground that the Court of Law could have caused satisfaction to be entered for the \$136, collected.

Fryer, the complainant, in this Court, assigns for error, that the demurrer was wrongfully sustained.

BAGBY and LYON, for the appellant.

ИТСНСОСК, for the appellee.

LIPSCOMB, C. J. delivered the opinion of a majority of the Court. The decree of the Circuit Chancellor was predicated on the ground that he supposed the relief was ample and sufficient at common law, and if this predicate is correct, there is no doubt but his conclusion was also correct. But what is that adequate and complete remedy? Before a rule could have been served on the old sheriff, to shew cause why satisfaction should not be entered, *pro-tanto*, the complainant would have been compelled by the second execution to pay the money. Again; satisfaction could not have been entered on the ex-parte shewing of the complainant. Would a *supersedeas* have afforded a remedy? A *supersedeas* is a common law writ, and if the case was such as would in any aspect have supported such a writ, its effects would have been to stop the execution entirely, and by so doing, an injustice would have been done to the plaintiff in the execution. A *supersedeas* could not have partially destroyed the effect of the execution, it would have operated as an entire bar or not at all. But it seems to me that it was not a ground for a *supersedeas*; the proceedings all had the appearance of fairness, and did not shew that the execution had improvidently issued. A majority of the Court are of opinion that Chancery alone could

afford relief, and that there was error in sustaining the demurrer and dismissing the bill, and that therefore the decree should be reversed and the cause remanded, with leave to answer.

JULY 1829.

Fryer  
v.  
Austill.

By JUDGE WHITE. The only question in the present case is, whether the complainant could not have had ample redress at law. If he could, the decree of the Chancellor below, dismissing his bill was correct, and should be affirmed. He complains that the one hundred and thirty-six dollars enjoined had been made out of John E. Myles, for whom his intestate was security in a writ of error bond, and against whom and his said intestate, judgment was affirmed; but that the sheriff returned the execution "no money made," absconded, and a second execution issued against the estate of his intestate in his hands, for the whole amount of said judgment, Myles having in the mean time died insolvent. In the case of *Lansing v Eddy*,<sup>a</sup> it is determined, "that an injunction will not be granted to stay a sale under execution on the ground that the judgment has been fully paid and satisfied; for the party has a prompt and adequate remedy at law." These are the words of the marginal note. In the body of the case,<sup>b</sup> it is said, that this remedy is by order of the Judge; what kind of order this is does not appear, except that it will stay a second sale, and afford ample redress. I should however presume, from an analogous practice, which I will presently shew, prevails in the English Courts, that it must be in the nature of a *supersedeas*, and having satisfaction entered of record. Neither can it be supposed that this practice grows out of any peculiar provision of the statutes of New York, as this is not intimated in the cases, and a similar mode of redress obtains in others Courts of Common Law jurisdiction; and if we were to admit as contended for, that a *supersedeas* is entire, and cannot apply to a part only of an execution, still the present case would not be distinguished from the one cited, because the complainant, by paying the part of the judgment which had not been previously made out of his principal, and which he in his bill states he is ready to pay, might have superseded the whole execution. In Blackstone's Commentaries,<sup>c</sup> it is laid down, that if after judgment a defendant has obtained a general release, or paid the debt, and satisfaction is not entered of record, the ancient method of redress was by writ of *audita querela*, which

<sup>a</sup> 1 John. Cli.  
R. 49.

<sup>b</sup> page 51.

<sup>c</sup> Vol. 3, p. 406.

JULY 1829.

Fryer  
v.  
Austill.

---

was in the nature of an equitable proceeding. It was a common law process, though in the nature of a bill in equity. Under this proceeding, an inquiry was had by the Court, says Blackstone, into the fact which constituted the parties right to redress who sued out the process. If this fact was a payment, upon this appearing, it was entered of record, for the very object of the inquiry under this ancient writ in such a case, was to have the payment entered of record. This was beneficial to the party, and that which he had a right to demand, that he might have perpetual evidence of his discharge from the judgment. But in the same place, of the same book, it is said that "the indulgence now shewn by the Courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice. This being the case, it is fair to presume the remedy by motion now allowed, is substantially of the same nature, equally, nay, more extensively remedial than that formerly given by the writ of *audita querela*. But this writ, says Blackstone, was very remedial, hence the remedy by motion must be so likewise, under this writ too, facts were inquired into by the Court, and a payment, when shewn to be made, was ordered to be put on the record. So also it may be on motion, or the substituted remedy would not ensure the same beneficial ends as that which it has superseded. It is observable that though this author, in speaking of the payment to be inquired into, mentions a payment to plaintiff, yet he does not seem to design to distinguish between such, and those made to the sheriff. Indeed, I cannot, as it relates to this question, perceive any difference between them. A payment to the sheriff, is a payment to the party, so far at least as it operates to the discharge of the defendant. Besides, the sheriff is the ministerial officer of the Court, and is commanded by its process, not only to make the money, but to make a true return of what he has done. This is not merely for the benefit of the plaintiff, but for the safety of defendant; for, as already shewn, he has a right to have record evidence of his discharge from the judgment, when he pays it. Can it then be possible, in this view of the case, that a court of common law is so destitute of power to effect its own purposes, and control its own officers, as to force suitors into Chancery to prevent oppression from the false and fraudulent conduct of such officers, done too, if not in

JULY 1890.

Fryer  
v.  
Austill.

---

contempt of, at least contrary to its own mandate? I cannot believe it. It has already been seen, that they have the power to inquire into the fact of payment, on motion in open court, and if so, they must have the incidental power to supersede an execution in vacation, until the sitting of court. This is not only apparent from the case cited from Johnson, as a common law principle, but as I conceive from the provisions of our own statute. In the Laws of Alabama, page 319, this statute will be found; its words are "That the Judges of the Circuit Courts respectively, shall have power and authority in vacation, to supersede any execution, when it shall satisfactorily appear to them or any of them, that the same shall have improperly issued from the clerks's office of any of the Circuit Courts of this State." A *supersedeas* is a remedial writ, and if so, it cannot be conceived that this statute was intended to restrict its beneficial operation. Then I should say, that the execution in the present case according to the true spirit of this statute, issued improperly; and that upon that fact appearing, on petition verified by affidavit, to a Circuit Judge, and the complainant paying what he admits to be due, such Judge would be bound to supersede the execution till Court; at which time he might, as appears by the books already referred to, ascertain whether payment was made, and if made, order satisfaction to be entered of record. This would be a more expeditious, less expensive, and in almost every conceivable case, an equally efficient remedy with a resort to equity. Take the case before us, as it appears to be, for an extreme one: the sheriff is runaway; the plaintiff in execution knows nothing about the payment; how then is the complainant to obtain better proof in equity than at law? Nor are these principles unsanctioned by practice in our own Courts, or those of States immediately about us. In Tennessee, where there has been a wrong taxation of costs, it is usual to supersede the execution, and correct such taxation by motion in open Court. A similar practice in like cases has obtained with the Circuit Courts in the northern end of this State. Many can bear witness to the convenience of such a remedy, whilst none as far as I know, have there questioned its legality. Suppose A. were to sue B. and was to summon twenty witnesses, but capriciously to discharge all but two, without examining them. Would the defendant, though he might lose the suit, be liable to pay the costs of their attendance? Would they not have a

JULY 1829.

Fryer  
v.  
Austill.

right to prove that attendance, and could the clerk do otherwise than tax such attendance in the bill of costs? This must be admitted. If in such a case, which is not unusual, the defendant should not find out this imposition before the Court adjourned, could he not obtain redress? He certainly could. But he should not be driven to a Court of Equity. Common Law Courts have a right, at any time before the money is paid over by the sheriff, to rectify a taxation of costs. This is reasonable and decided to be correct, as represented in 1. Tennessee Reports. But this practice pre-supposes the existence of powers in Courts of Common Law, which it is obvious would have remedied the injury of the plaintiff in the present case. He then had ample redress without a resort to Chancery, and the decree being founded on this principle should be affirmed.

By JUDGE COLLIER. I concur in the opinion pronounced by the Chief Justice, yet dissent from the suggestion made in that opinion, that an execution cannot be superseded in part and continued in force for the residue. I believe the reverse to be the law. Judges CRENSHAW, (who did not sit in this cause) and TAYLOR, concur with me.

Decree reversed and cause remanded.

### HUNT and CONDRY v. MAYFIELD.

1. In debt on the record of a recovery in a sister State, under the issue of *nul tiel record*, if a duly certified exemplification is produced, of a judgment, valid in the State where rendered, though not founded on personal service, judgment must be given for the plaintiff.
2. In such cases, *nul tiel record* is the general issue, but is not the only plea that may be pleaded.
3. Special matters of defence, for the want of jurisdiction over the subject matter of controversy, or person of the defendant, in the Court of such sister State, must be specially pleaded, if relied on.
4. Under the issue of *nul tiel record*, the Court will not give the interest of the sister State on such judgment. The rate and amount of interest must be found by a jury.

THIS was an action of debt, instituted by John Hunt and William Condry, in the Circuit Court of Lauderdale coun-

ty, in March, 1826, to recover of Brice M. Mayfield, the amount of a judgment which they obtained against him in the Court of Pleas and Quarter Sessions in the county of Claiborne, in the State of Tennessee; and was founded on an exemplification of the record of said recovery. They declared in the usual form on the record: the defendant pleaded *nul tiel record*, and issue was joined on that plea.

JULY 1829.

Hunt and  
Condry  
v.  
Mayfield.

---

By a bill of exceptions taken by the plaintiffs, it appears that they produced an exemplification, regularly certified, of the proceedings had in the Court of Pleas and Quarter Sessions in Tennessee, which exemplification is fully set out. It shews that on the 19th of December, 1825, before said Court, composed of six justices then sitting, "the plaintiffs by their attorney moved for judgment against the defendant for \$980 40, which they allege they have paid as the securities of said Mayfield, and in consequence of a judgment rendered against them in the Court of Pleas and Quarter Sessions for Claiborne county, in said State, on a note given by them and said Mayfield, to S. Posey, administratrix, in whose favor judgment was rendered, the 13th of November, 1821, for \$776 24, debt and damages, and \$14 39, costs of suit." The record proceeds thus: "But it not appearing to the satisfaction of the Court by inspection of the papers, that the plaintiffs were the securities of the defendant Mayfield in said note, on which that judgment was obtained, it is therefore ordered that a jury be empanelled to inquire of the fact, if the plaintiffs were merely the securities of the defendant in said note;" upon this, a jury was empanelled, who found by their verdict that they were securities merely for the payment of said note. After this, is the following entry: "It appearing to the satisfaction of the Court, by proof adduced to them, that said plaintiffs, Hunt and Condry, have paid of principal and interest under said judgment, the said sum of \$980 40; it is therefore considered by the Court, that said plaintiffs, Hunt and Condry, recover of the defendant Mayfield, said sum of \$980 40, and also the costs of this motion, and that the defendant be in mercy, &c."

At the October term, 1826, of the Circuit Court of Lauderdale county, the cause was tried; and the Court being of opinion that the record was insufficient to sustain the issue for the plaintiffs, gave judgment thereon for the defendant.

The error assigned in this Court by the plaintiffs is, that the record was improperly rejected, and that the

JULY 1829.

Hunt and  
Coudry  
v.  
Mayfield.

Court should have determined the issue of *nul tiel record* in their favor.

<sup>a</sup> Scott's revised laws of Tenn. vol. 1, 703, 1171, 697, 780. Cooke's Tenn. Rep. 267, 464, 466.

W. B. MARTIN and HOPKINS, for the appellants. The transcript is correctly certified, and the proceedings had in Tennessee, though not founded on personal notice, will be found on examination to be strictly legal under the statutes of Tennessee. <sup>a</sup> The statutes of Tennessee require the fact of securityship to be tried by a jury, this was done. This judgment, in Tennessee, could not be reversed for error; the case cited from Cook's Reports, which was a similar case, proves this. This Court is bound to give to this judgment here the same validity it had in Tennessee, and the same credit is due to the record here as there. To affirm the judgment below, would be to refuse to give to the record and judgment of a sister State, its full faith and credit, as required by the Constitution of the United States, and the act of Congress. The act of Congress makes no distinction between proceedings *ex parte*, and those that are not so; then how can any sound argument be drawn, to establish that it shall apply only to cases where both parties are in Court? Why shall it not embrace proceedings had under statute laws, as well as those at common law? Are they not the *judicial proceedings* and *records* of a sister State? The presumption must be in favor of the record, and it cannot be presumed the Court in Tennessee was regardless of the rights of the defendant; that would be to give to the record *no credit* at all. It does appear that all the proof that was necessary was in fact produced before that Court.

There are various proceedings in the several States, which are records, and are so considered, although they are *ex parte*; as the probate of wills, deeds, settling of estates, &c., by which all the world, whether parties or not are bound, whether they have notice or not. All those proceedings are at least *prima facie* evidence.

This statute of Tennessee, giving the summary remedy required no notice, so none was necessary. It is a statute passed for the benefit of securities, and is of a remedial nature; therefore it should be liberally construed. Cases of this kind differ from cases of attachment, and are distinguishable from them. Such cases are of themselves original proceedings without any notice; but this is a case of implied notice, and growing out of other previous proceedings. It has been held that a judgment founded on two

returns "*nihil*," would be sufficient to support the judgment of a sister State. <sup>a</sup>

It must be recollected that in this cause the plea of *nul tiel record*, is alone pleaded. Several of the cases cited on the other side, go only to shew that other pleas than *nul tiel record* may be pleaded. Had a special plea alleging a want of jurisdiction, or any other special matter, avoiding the judgment, been filed, we could have replied and tried such special matter. But the plea of *nul tiel record* only puts in issue the existence of our judgment, and having in our possession a transcript duly authenticated, shewing the existence of a judgment not reversible in Tennessee, we felt safe under the issue joined. It will also be perceived, that if we fail in this action, our debt will be lost; for the statute of limitations would bar any other recovery. We therefore think the Court would be disposed to hesitate, before affirming the judgment against us. <sup>b</sup>

COALTER, for the appellee. The defendant below, and who was also defendant in Tennessee, had no notice, either actual or constructive, of the proceedings had against him in Tennessee; therefore they are a nullity and void, and no evidence against him in the Courts of this State. <sup>c</sup> Parties to a suit can only be made by process or by consent, and in no other way. <sup>d</sup> In summary proceedings, and proceedings before inferior jurisdictions, every thing must appear in the record itself, such as notice, &c., which is necessary to give the Court jurisdiction, without which, the whole proceedings are *coram non judice*, and void. <sup>e</sup>

By JUDGE SAFFOLD. The bill of exceptions taken by the plaintiffs in the Court below, brings before this Court the transcript of the record on which the suit was brought, and presents for consideration a question of considerable magnitude; and which, in principle, is also involved in several other cases now pending in this Court. The question relates to the effect of a judgment obtained in a sister State, against a defendant residing out of the same, and where there has been no personal service of the process. No objection is found to the sufficiency of the certificates, either of the clerk or presiding justice of the Court; but it is insisted, and was so adjudged below, that in legal acceptation, this is not a record on which a judgment can be rendered in this State.

It will be observed, that it is not in any way shewn that

JULY 1829.

Hunt and  
Condry  
v.  
Mayfield.

a 1 Littell 117.  
417. 5 Littell  
349.

b 1 Chitty's P.  
480, 481, note  
37. 1 Starkie  
215, note J.  
7 Cranch 481.  
4 Cowen 292.  
19 John, 162.  
3 Wheat. 234.

c 8 John. 67. 9  
East 192, 132.  
13 John. 192.  
1 Littell 118.  
3 Whart. Dig.  
362, No. 41,  
42. 3 Bibb  
454-5.  
d 3 Wharton's  
Dig. 360, No.  
19.  
e 4 Burrow  
224, 2281.  
Minor's Ala.  
Rep.  
1 Stewart



JULY 1820.

Hunt and  
Condry  
v.  
Mayfield.

the defendant Mayfield, was not an inhabitant of Tennessee, nor that he was not subject to the jurisdiction of the Court there, at the time the proceedings were had against him. It is not our intention to extend the rule of decision in this case beyond the principles necessarily involved in it; or to declare the kind or nature of defence which would be available against a judgment rendered in a different State or nation, where there has been personal service of process, the proceedings conformable to the laws of the country, and the record certified in due form. Here there was no personal service of the process, or appearance by the defendant, which would have been tantamount to actual notice; the Court appears to have proceeded according to the law of that State, upon the ground of constructive notice, arising from the facts, that the defendant was the principal debtor in the note referred to, the plaintiffs his securities, and that they had paid and satisfied the same, after judgment obtained against them as such, in that State.

<sup>a</sup> Cooke's R.  
267, 464, 465.  
Scott's Revi.  
1 vol. 703,  
1171.

This recovery appears to have been authorised by the law of that State, and in the form pursued. <sup>a</sup> Then should the plea of *nul tiel record* have been sustained to the suit brought on this recovery? or must not the defendant, if he could avail himself of the want of jurisdiction in the Court, or other extrinsic matter of defence, have resorted to a special plea in bar? Under an issue of *nul tiel record*, the Court can only inspect the record of recovery, and unless the want of jurisdiction, or some other insufficiency appear, which would destroy the force and effect of the judgment in the State in which it was rendered, judgment must be given for the plaintiff. On this important subject it would be impossible to reconcile the decisions of the Supreme Court of the Union, with those of the highest tribunals of some of the States; yet it must be admitted, that as the question involves the construction of the Federal Constitution, the decisions of the Federal Tribunal, having authority to control all others, must prevail.

<sup>b</sup> Armstrong  
vs. Carson's  
Ex'rs. 2 Dal-  
las 302. Bor-  
den vs. Fitch  
15 John. 121.  
<sup>c</sup> 7 Cranch 461

For a time the doctrine prevailed in the State of New York, that a judgment from a sister State was to be regarded as a foreign judgment; that it was only *prima facie* evidence of the debt, and that the defendant could plead *nil debet* to an action of debt brought upon it. The decisions however of other tribunals, appear to have yielded in a good degree to the paramount authority. <sup>b</sup> The Supreme Court of the United States, in the case of *Mills v. Dur- yce*, <sup>c</sup> decided, that the act of Congress of 1790, chap-

JULY 1829.

Hunt and  
Condry  
v.  
Mayfield.

ter 38, prescribed the mode in which the public acts, records and judicial proceedings in each State shall be authenticated, so as to take effect in every other State: declaring that the record of a judgment, duly authenticated, shall have such faith and credit, as it has in the State Court from whence it was taken; and if in such Court it has the effect of *record evidence*, it must have the same in every other Court within the United States; and that in such case, the only proper inquiry is, what would be the effect of the judgment in the State where it was rendered. The same Court in the case of *Hampton v. McConnel*,<sup>a</sup> professing to recognise the former doctrine, said that it was held in the case of *Mills v. Duryee* "that the judgment of a State Court should have the same *credit, validity and effect*, in every other Court in the United States. which it had in the State where it was pronounced; and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other Court in the United States.

<sup>a</sup> 3 Whea. 224

I concur however, in the view taken of the decision in *Mills v. Duryee*, by the Supreme Court of New York, in the case of *Shumway v. Stillman*,<sup>b</sup> that "the only general proposition upon the subject of pleading established by that case, is, that *nul tiel record* is the only proper *general issue* in an action of debt on a State judgment;" and the opinion of that Court is implied, that the judgment would not be conclusive, where the Court had not acquired jurisdiction over the person of the defendant; and that in such case, *nul tiel record* was not the *only* proper plea. In the case last referred to, this doctrine is explicitly maintained. The same principle is maintained in the late decision of the Supreme Court of the United States, of *Biddle v. Wilkins*;<sup>c</sup> that "when the Court in which the judgment is rendered had not jurisdiction over the subject matter of the suit, or when the judgment is absolutely void, this may be pleaded in bar, or may in some cases be given in evidence under the general issue. But the general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation."

<sup>b</sup> 4 Cowen 292.<sup>c</sup> 1 Peters 686.

The effect of these rules of decision is conceived to be, that where the proceedings appear to have been conducted conformably to the laws of the State in which they were had, defence for the want of jurisdiction in the Court, either over the subject matter in contest, or the person of the defendant, can only be made by special plea in bar; con-

JULY 1839.

Hunt and  
Cordry  
v.  
Mayfield.

sequently, the judgment rendered in this case must be reversed, and the cause remanded; unless the plaintiffs be willing to abandon their claim to interest since the date of the judgment in Tennessee, and accept a rendition of judgment here for the same amount of *that judgment*. The law of interest in another State is in the nature of evidence, requiring the intervention of a jury, and subject to opposition from the adverse party.

The plaintiffs consenting to abandon the interest, judgment is rendered for the amount of the judgment, on which the suit was brought.

Judgment reversed and rendered.

JUDGE WHITE, not sitting.

2s 130  
112 324

#### TANKERSLEY V. RICHARDSON.

1. After the return term of the writ, no exception can be taken, for the want of an endorsement of the cause of action.
2. Awards being much favored, the Court will intend every thing which the record will warrant, to sustain a judgment rendered on an award.
3. The award in this cause, held sufficient to support the judgment; although no declaration was filed.

THE record in this cause shews that on the 30th of March, 1824, a writ issued against Richard Tankersley, to answer unto Thomas Richardson, as surviving partner of the firm of *Richardson & Blake*, in a plea of trespass on the case, to the damage of the plaintiff of \$1000. The writ was returnable to the April term of Mobile Circuit Court, and was executed. No endorsement of the cause of action appeared on the writ. After the writ in the record, the following entry appears: "This cause having been referred to the arbitrament of Amos Woodward and William Barnwell, and they having made this award, in the words and figures following, to wit: "We the undersigned referees, appointed to examine into the accounts between the late firm of Richardson and Blake, and Mr Richard Tankersley, have performed the duty required of us, and report and award \$160 83 the balance due by Richard Tankersley to Richardson and Blake."

A. WOODWARD,  
W. BARNWELL.

"Wherefore it is considered by the Court now here, that the said Thomas Richardson, junior, surviving partner as aforesaid, do recover under the award aforesaid, which is made the judgment of the Court, the aforesaid sum of \$160 80, together with his costs, by him about his suit, in this behalf expended."

JULY 1829.

Tankersley  
v.  
Richardson.

The above, comprises the whole record, as certified. The term of judgment does not appear; except that the title of the record reads thus: "Pleas before the Honorable Abner S. Lipscomb, Judge of the first Judicial Circuit of the State of Alabama, holden in and for the county of Mobile, at the April term of said Court, in the year 1826."

*Tankersley*, here assigns for error. 1. That there is no endorsement of the cause of action on the writ, as required by statute. 2. That there is no declaration, or cause of action set forth. 3. That the persons named as arbitrators do not appear to have been appointed by the parties or with their consent. 4. That the arbitration does not appear to be between the parties to the action. 5. That no term is expressed in the record, at which judgment was rendered.

*ACRE*, for the plaintiff in error, argued, that by the statute, <sup>a</sup> the cause of action must be endorsed on the writ; that it therefore become an essential part of the writ, which, without such endorsement is a nullity. That a declaration is necessary, in order that the judgment on the cause of action therein set forth may be pleaded in bar to another action for the same matter. That it is determined by arbitration, does not vary the rule, because the same reason still exists. But here, there is no submission to arbitration, either in the form of an agreement, or by order of Court. The statement of the clerk that arbitrators were appointed, is no proof of that fact. A copy of the order of reference if any, is the only evidence that is proper.

<sup>a</sup> Laws of Ala.  
453, Sec. 31.  
Minor's Ala.  
R. 102.

The case of *Jones v. Acre*, <sup>b</sup> decided in this Court, sustains the position taken under the last assignment of error, as to the term of the Court when judgment was rendered not appearing in the record.

<sup>b</sup> Minor's Ala.  
R. 5.

By JUDGE COLLIER. Five several matters, assigned for error in this cause, are presented for our consideration. By an act of 1807, <sup>c</sup> entitled "an act establishing Superior Courts, and declaring the powers of the Territorial Judges," the clerk or plaintiff's attorney, is directed to endorse on the writ the cause of action, and the sheriff is di-

<sup>c</sup> Laws Ala.  
453.

JULY 1829.

Tankersley  
v.  
Richardson.

---

rected on executing the writ, to deliver to the defendant a copy of the endorsement. The statute does not consider the endorsement as an essential constituent of the suit; it rather seems to consider them as distinct, yet, at some stage of the proceedings, perhaps dependent for their legal offices on each other; without therefore pretending to determine how far such objections as appear on the original process, are available on error, the Court have no difficulty in attaining the conclusion, that an exception cannot be taken to the want of an endorsement, after the return term of the writ.

The sufficiency of the second assignment depends on the consideration which the Court may give to those that follow; if the award is sustainable, there cannot be a doubt, that no declaration is required.

The adjustment of controversies and suits by arbitration, is a species of remedy much favored by legislation; so much so, that, not only what can be, is intended in its favor, but it will not be permitted to be impugned for any extrinsic cause; unless it be founded in corruption, partiality, or other undue means. This is the consideration in which awards are holden in the Courts to which they are returned. This Court must, in accordance with a rule repeatedly laid down, not only intend in favor of the award, but of the judgment below, every circumstance or point which the record warrants, that is necessary to legitimate the action of the Court. It may infer, that the award was made the judgment of the Court, (the reverse not appearing,) by the consent of the parties; and if it was, an order of reference is dispensed with, and the judgment is tantamount to a judgment by confession, and cannot be erroneous in point of fact. It is however the opinion of some of the members of the Court, that the entry on the record, preceding the award and judgment, is in itself an order to refer the cause. It is needless to inquire, whether the entry of the reference and judgment is sufficient, within the act of 1799, entitled an act concerning defalcation, <sup>a</sup> as it may well (and perhaps most rationally) be intended, that the judgment was by consent. The fourth and fifth assignments, are not, it is conceived, sustained by the record. The identity of the parties in the writ and judgment sufficiently appears. The caption of the record shews when the judgment was rendered, and it appears from other facts in the record, that the writ of error is not barred by the statute of limitations.

<sup>a</sup> Laws of Ala.  
457.

The Court are therefore of opinion, that the judgment below must be affirmed.

The CHIEF JUSTICE, not sitting.

JULY 1829.

Tankersley  
v.  
Richardson.

NOTE.—See the case of Mendenhall v. Smith, Minor's Ala. Rep. 380; also, 1. Stewart's Rep. 152, 244.

### KING v. GREEN, et al.

1. The intermarriage of an administratrix, with an obligor in a bond payable to her as administratrix, does not extinguish the debt, but merely suspends the right of action during the coverture, and while she continues administratrix.
2. A bond made payable to an administrator as such, is assets in the hands of an administrator *de bonis non*. The description will not be considered as mere *descriptio personæ*.
3. Where in open Court, it is consented that the papers shall be taken out by the Judge, and that a judgment be rendered in vacation, as of the preceding term, and judgment is so rendered, it is a sufficient and final judgment; at least it is sufficient to sustain a writ of error thereupon taken.

GEORGE C. KING, sheriff of Perry county, and administrator *de bonis non*, by virtue of his office, of John Bass, deceased, brought an action of debt in Perry Circuit Court, against Jetson Green, B. W. Holliday, and John Welsh, to recover of them the amount due on a sealed note made by them.

The declaration was in the detinet, and contained two counts. In the first count it was averred, that the defendants, Jetson Green, B. W. Holliday, and J. Welsh, on the 13th December, 1822, made and sealed a specialty, promising to pay twelve months after the date, to Julian Bass, administratrix, and to M. Holliman, administrator of John Bass, deceased, or their assigns, four hundred and forty-four dollars and forty-five cents, for value received; that Julian Bass was the administratrix, and M. Holliman the administrator of John Bass, who died intestate; that Julian Bass intermarried with Jetson Green, one of the obligors, who thereby became also an administrator in right of his wife Julian, and entitled to the administration jointly with Holliman; that afterwards, on the 6th of May, 1825, the letters of administration as to Julian and her husband, by the Orphan's Court of Perry county, were revoked, and were surrendered; and on the 20th of the same month, the letters of administration as to Holliman were also surrendered

JULY 1820.

King  
v.  
Green.

to said Court; that afterwards the administration of said estate was committed by the said Orphan's Court to J. B. Nave, then sheriff of Perry county, and that the plaintiff, King, was at the commencement of the action, and still is the successor in office of Nave, as sheriff, &c. The second count was the same, with the exception that the intermarriage of Jetson Green with Julian was not mentioned, nor his administration, but Nave was alledged to have succeeded Julian Bass and M. Holliman in the administration, &c.

The defendants filed a general demurrer to the declaration. It appears by the record, that at November term, 1826, it was agreed by the counsel, that the cause should be argued at Bibb Circuit Court, and that the judgment should be entered on the decision of the Judge there, as of November term of Perry Court. On the 24th of November, Judge Gayle, who presided, returned the papers, with his decision thereon in writing, sustaining the demurrer, and rendering judgment for the defendants; which was recorded.

This judgment was by *King*, the plaintiff, here assigned for error.

BARTON and STEWART, for the plaintiff in error, argued, that the demurrer should have been overruled; that the marriage of Julian the administratrix, with Jetson Green, operated only as a suspension of the right of action during the coverture, and while her and her husband were entitled to the administration; but that the debt was not thereby extinguished; that the absolute rights of the parties were not affected by her marriage with an obligor; <sup>a</sup> that the bond was assets in the hands of the administrator *de bonis non*; <sup>b</sup> the names of the payees are not mere *descriptio personæ*; <sup>c</sup> that the second count was clearly good; as no marriage there appears, it is free from any objection whatever; that the demurrer being general, to the whole declaration, and at least one count being good, it should have been overruled. <sup>d</sup>

H. G. PERRY, for the appellees, argued, that the demurrer was properly sustained; and in addition thereto, that the writ of error should be dismissed; that the judgment not having been rendered in term time, it was not final, but merely an order for judgment, requiring another act of the Court to perfect it; that no judgment can be entered in vacation, the statute requiring the minutes or re-

<sup>a</sup> 1 Chitty's P.  
44, 22. Croke  
Charles 373.  
1 Com. Dig.  
236. 2 Bacon's  
Ab. 379, 380.  
Toller's Ex'rs  
273. Acts of  
1825, p. 8.  
<sup>b</sup> Laws of Ala.  
324. 7 T. R.  
178. 1 T. R.  
489. 1 Chit.  
Pl. 13. Tol-  
ler's Ex'rs.  
438. Minor's  
Ala. R. 206.  
<sup>c</sup> 5 Com. Dig.  
200.  
<sup>d</sup> 1. Stewart's  
R. 231.

cords of the Court to be read every morning, and signed on the last day of the term by the presiding Judge. <sup>a</sup> The order should have stood over till the next term, and then a judgment on it could have been rendered by the Court, such as the statute requires.

JULY 1829.

King  
v.  
Green.<sup>a</sup> Laws of Ala.  
167. Act of  
1819.

By JUDGE WHITE. In the opinion of the Judge who presided in the Court below, and which is filed of record, the case is assimilated to one, where, in a note given to an administrator, he becomes security for himself. In England, when a creditor appoints his debtor executor, when his own creditors will not be injured, and there is nothing expressed in the will to the contrary, it will operate as an extinguishment of the debt, on the principle that from such an act of the testator, it may reasonably be inferred, that such was his intention. In that case, *the party himself* acting in his *own right*, having destroyed the remedy, it is forever gone. But it is otherwise where administration of the estate is committed by *the act of the law* to a debtor. There the remedy is only suspended for a time, by the legal operation of the grant. Thus, if the obligor of a bond administer to the obligee, and die; a creditor of the obligee, having obtained administration *de bonis non*, may maintain an action for such debt against the executor of the obligor. So, if the executrix of an obligee marry the obligor, such marriage is no release of the debt, and the husband may pay it to the wife in the character of executrix; and if he do not, the remedy is suspended only, by the legal effect of the coverture; and on her death, the administrator *de bonis non* of the testator will be equally entitled to that debt, as to any other outstanding. <sup>b</sup> In the first volume of Chitty's Pleadings, it is said, <sup>c</sup> that if an executrix marry a debtor to her testator, the right of action is only suspended during the coverture; and if she survives, she may, in the character of executrix, sue the representatives of the husband, as the wife surviving is entitled to all actions in *auter droit*. From these principles it results, that if the bond on which this action is founded must be esteemed assets in the hands of the administratrix, or in other words, if she held it in *auter droit*, then her marrying one of the obligors would only suspend the remedy, but not destroy the right. In the book last cited <sup>d</sup> it is expressly laid down, that an executor may *sue as such*, upon a contract made with him in that character, as for goods sold by him as executor, and

<sup>b</sup> Toller on  
Ex'rs. 272,  
273.  
<sup>c</sup> Vol. 1, p. 22.

<sup>d</sup> Page 13.



JULY 1829.

---

King  
v.  
Green.

---

in other cases where the sum to be recovered would be assets. Other authorities might be adduced to the same points, not only that in such cases he may sue as executor, but that the price of goods sold by him, in the character of executor, are assets; and if this will hold in England, it is more especially true in this State, where executors and administrators are not only permitted, but required to sell the perishable estates of decedents upon credit. Bonds and notes therefore taken at such sales, would be held by them, not in their own right, but as assets, in the right of others. And hence upon their death, resignation or removal, such notes or bonds would pass to those entrusted with the further administration, as part of the estate unadministered. It follows as a fair deduction from what has been said, that in the present action, one of the obligees, who was administrator, having married an obligor to the bond sued on, which bond she held as assets, the remedy was merely suspended, and not destroyed as if it had been held in her own right, for her own benefit. And this suspension of the right to sue would have continued during coverture, but for her resignation and the appointment of another to finish the administration. When this was done, this disability was removed, the right of action restored, and as we conceive properly asserted and fairly sustainable.

But it is said the judgment is of a character, that the writ of error cannot be prosecuted, and should be dismissed. We are of a different opinion. The record shews that by agreement, the Judge took the papers, decided the case in vacation, and having returned them to the clerk, a reference was had to his determination, and a judgment was entered, not exactly in form, but as we conceive, sufficiently so to be reversed, if erroneous; and we believe it was erroneous.

The judgment must be reversed, and the cause remanded.

## WINSTON V. MOSELEY.

1. A plaintiff cannot, after examining a witness introduced by himself, propound questions to him, tending to shew him to be incompetent, or unworthy of credit.
2. Nor can he examine other witnesses to prove him incompetent, or to impeach his credit.
3. But he may introduce other witnesses to establish the facts of his cause, though they contradict what his previous witness deposed.
4. There being three issues, and a verdict for the defendant, some of the jury disagreeing as to one issue, the verdict is nevertheless sufficient to authorize a judgment for the defendant.
5. A cotton receipt, assigned by the payee before it is due, is not subject in the hands of an innocent indorsee without notice, to a set off existing against the payee.
6. Cotton receipts, by our statutes, are placed on the same footing, as to negotiability, with inland bills of exchange.

This was an action of assumpsit, brought by J. J. Winston against W. F. Moseley, in Lawrence Circuit Court, in March, 1823, to recover on a cotton receipt, given to W. Pettus, by the defendant, who was a ginner of cotton, on the 10th of December, 1821; whereby he acknowledged to have received of Pettus 60,000 pounds of cotton in the seed, to be picked, baled and delivered to Pettus for one twentieth; Pettus providing the materials for baling. This receipt was on the day of its date, assigned by Pettus to the plaintiff.

The defendant pleaded: 1. That he did not execute the receipt; which was verified on oath. 2. That the cotton was all delivered to Pettus, before notice of the assignment. 3. As a set off, that Pettus, at the time of the commencement of the action, was indebted to the defendant in the sum of \$250, by a note made by Pettus to the defendant, the 20th December, 1820, and payable in cotton of the crop of 1821; and further by an agreement made between Pettus and one William Moseley, dated the 17th November, 1821, whereby Pettus promised to pay \$1329,66, in cotton, to be delivered at the gin of the defendant; and which on the 26th of December, 1821, and before notice of the transfer of the cotton receipt sued on, had been by William Moseley, assigned to W. F. Moseley, the defendant. The issues were tried at March term 1827, when the jury found a verdict for the defendant, and "*some of the jury*" also said, that "the receipt on which the action was brought, was genuine." Thereupon the Court rendered judgment for the defendant.

JULY 1829.

Winston  
v.  
Moseley.

By a bill of exceptions tendered by Winston, it appeared that the plaintiff introduced as a witness, William Moseley, who deposed, that on the 26th December, 1821, he transferred to W. F. Moseley, the defendant, the agreement made to him by Pettus, that the transfer was absolute, and for value received, and that he did not then know of the existence of, or transfer of the cotton receipt sued on by Winston. After he had been cross-examined, the plaintiff's counsel asked him if he was not bound by contract with the defendant, to release him from the whole or part of the consideration given for the transfer of the agreement, if it did not prove to be a sufficient set-off, or if he was not bound for part of the costs of the action, if the defence failed. The defendant objected to the witness answering those questions, and the Court sustained the objection.

Eppes, another witness, was then introduced by the plaintiff and examined as to facts going to contradict the evidence of the former witness, without objection, and was then requested by the plaintiff's counsel to relate all the conversations which had taken place between him and the witness Moseley, concerning the subject of controversy. This was also objected to by the defendant, and the objection was sustained.

The plaintiff's counsel requested the Court to instruct the jury, that the defendant was not entitled to either item of set off relied on, because there was no proof that the plaintiff had notice of them, at the time his receipt was transferred to him. But the Court refused that instruction, and charged the jury that the items of set off, so far as they were proved to exist before the defendant had notice of the transfer, were available against the plaintiff.

The matters of this bill of exceptions were assigned by Winston, the plaintiff in this Court, as error; and also, that the verdict not being given by the unanimous assent of twelve jurors, was irregular and void, not being responsive to the issue on the first plea, so that there was no basis for the judgment rendered.

KELLY and HUTCHISON, for the appellant.

COALTER, for the defendant. \*

\* 1 Starkie's Evid. 147. 3 Starkie's Evi. 175l. 3 Marshall 32. Grundy v. Jackson 3d Wharton's Dig 365. Laws of Ala. 66.

By JUDGE COLLIER. The opinion of this Court is asked upon the following questions of law, 1. Can a party be permitted to shew the incompetency of a witness

introduced and examined by himself, by a question propounded to that witness? 2. Can he shew the incompetency of such witness, by the examination of other witnesses? 3. Is a verdict in these words: "they (the jury) say that they find a verdict for the defendant, and some of the jury also say, that the receipt on which the action is brought, is genuine," a sufficient warrant for a judgment in favor of the defendant, where there is one plea among others, putting in issue the execution of the writing sued on? 4. Are the securities called by our law "cotton receipts," so far negotiable as in an action brought on one by an indorsee, before due, to prevent a demand acquired by the maker, against the payee, previous to notice of assignment, from being made the subject of a set-off?

It is understood to be a well settled principle of law, that a party cannot discredit the testimony of his own witness, or shew his incompetency, <sup>a</sup> and the reason of it is this, because it would be unfair that he should have the benefit of the testimony if favorable, and be able to reject it if the contrary. <sup>b</sup> It can avail the plaintiff nothing to say, that the answer to the question proposed by him, though its obvious tendency was to shew the witness incompetent, was not designed to be used for that purpose, but that the object was to shew, that the witness had never made a transfer by which he parted with his interest in the security supposed to have been assigned by the witness to the defendant, and which he was attempting to set off to the action, and thereby to defeat that defence. It is immaterial what may have been the intention of the plaintiff, that is a circumstance which cannot be noticed; the Court can only look to the answer which a direct response to the question would elicit, and determine from thence of its admissibility.

If it were conceded that the Court erred in overruling the question proposed, because it impugned the competency of the witness, the objection to the examination was nevertheless sustainable, because an affirmative answer would have contradicted what he had before said, and thereby shewn him undeserving of credit.

In sustaining the opinion of the Court below on the first ground, this Court is not to be understood as extending the rule further than it has expressly laid it down; a party may, in some instances, shew facts variant from what his own witness has stated; where a witness by surprise gives testimony against the party who calls him, he may make

JULY 1839.

Winston  
v.  
Moseley.

<sup>a</sup> 1 Starkie's.  
Ev. 147.

<sup>b</sup> Buller's  
NP. 297.

JULY 1839.

Winston  
v.  
Moseley.

¶ 1 Starkie  
Ev. 147.

out his case by other witnesses. When a party calls a witness, for the purpose of satisfying the formal proof required by the law, he may call other witnesses, who give contradictory testimony. \* The reasoning and authority upon the first point, are with equal force applicable to the second.

The verdict of the jury, is a sufficient authority for the judgment. It is sufficiently certain, and shews that though some of the jury may have disbelieved the truth of the plea which put in issue the making of the cotton receipt, yet they were of opinion that the defendant had sustained by proof some or all of his other pleas; and if upon either issue, a verdict was found for the defendant, the plaintiff's cause of action is fully answered, and the judgment should have followed the verdict. The true interpretation of the verdict is, that the jury found all the issues in favor of the defendant, but that which put in issue the execution of the cotton receipt; on that issue they expressed no opinion, as the verdict authorised a judgment for the defendant on the others. The defendant therefore cannot be permitted to object to a reversal, because it is not shewn that the judgment on that issue is erroneous.

The fourth point claims from the Court, a consideration more full and minute. It renders it necessary that the Court should declare by its decision the character of "*cotton receipts*;" whether they are to be esteemed as standing on equal ground, and regulated by the same principles that control the transfer of promissory notes, or whether they do not partake of the commercial character, and are therefore controllable by those rules of mercantile jurisprudence, which determine the nature and qualities of an inland bill of exchange. To a solution of these questions, the legislative acts in relation to them, must be examined. The first statute was passed in 1807, entitled "an act to render promissory notes and cotton receipts negotiable, and for other purposes. "

¶ Laws of Ala.  
p. 66.

The first section of this act makes promissory notes negotiable as inland bills of exchange were. The second section enacts, that cotton receipts shall be negotiable in the same manner as promissory notes are by the first. These propositions will be found apparent from an inspection of the act without calling in aid any rule of construction.

JULY 1839.

Winston  
v.  
Moseley.

It is now to be inquired, whether the second section of the act referred to, has been repealed. The first section of an act entitled, "an act concerning the assignment of bonds, notes, &c., and for other purposes," passed December 18, 1812, declares, "that all bonds, obligations, bills single, promissory notes, and all other writings, for the payment of money, or any other thing, shall and may be hereafter assigned by indorsement, &c;" and the same section gives to the obligor or maker, "the benefit of all payments, discounts and sets off, made, had or possessed against the same, previous to notice of the assignment." It is argued, that the second as well as the first section of the former act, is repealed by the provision here recited; that by the general expression "all other writings" is meant, cotton receipts, and every other security for the payment of money, or any other thing. If the statute of 1812, contained no other section than the one quoted, I should be prepared to yield to the justness of the argument. I know that a statute which deals in generalities, may repeal one, more particular in a description of the objects it provides for; but we are not permitted to decide the question by an application of that rule. There is a further provision in the act of 1812, which negatives the idea that the second section of the act of 1807, is repealed, and is considered as equivalent to an express declaration that that act is only repealed *pro tanto*, as it specifically relates to promissory notes. The section is as follows: "that an act entitled, 'an act to enable the assignees of bonds, bills, or notes, to bring actions for the recovery of the same, in their own name, and for other purposes;' and also such parts of an act entitled 'an act to render promissory notes and cotton receipts negotiable, and for other purposes,' as in any wise concerns promissory notes, be, and the same is hereby repealed."

The first section is a repeal by implication of the first and second sections of the act of 1807; the one just recited is an express repeal to the extent it professes, and according to the rules of construction, is viewed as paramount, and exercising a controlling influence over the former; the one repeals by construction, and that construction is predicated upon the fact of a repugnancy in the two enactments; the other is an express declaration by the legislature, how far the first act shall be in operation, and according to correct legal reasoning, is tantamount to a

JULY 1839.

Winston  
v.  
Moseley.

declaration of the extent to which the act of 1807, is operative, and in force of meaning is equivalent to such an expression. To present the idea in another form, the second section of the act of 1812, specially declares a repeal of the act of 1807, in part, and as it respects its other provisions, it is to be construed as if it had expressly continued, or excepted them from the influence of the first section, and the maxim of *expressio unius exclusio est alterius* restricts the control which that section by implication would be entitled to exercise over it, to the express declaration of the second. Why have the legislature enacted this second section, unless it was intended to be effectual? If it had been intended to repeal the act of 1807, so far as it related to the negotiability of the securities therein mentioned, this was done by the first section, because it was so far repugnant to that act, and being posterior in time, is paramount in authority. It could not have been done with a view to retain the third section, which prescribes the time, when cotton receipts shall be due and payable, when there is no time expressed, or any other section of the act of 1807. For these parts of that act do not conflict with the first section of the statute of 1812, and were not therefore abrogated by it. It will not do to determine that it was a senseless act of the legislature; if it be susceptible of a meaning, the maxim *ut res magis valeat quam pereat* requires that the Court should give to it that meaning.

Again; the first section, by the employment of general language as has been shewn, would operate a repeal of the first and section of the act of 1807, if it was not explained by the second which is special, but this explanation being manifest, the maxim that "the law general must yield to the law special," is a sufficient authority to determine that the first statute is in force to the extent I have endeavored to prove.

In the construction of statutes, there are certain rules fixed by legal adjudication, which, when adhered to, enable all Courts, and at all times, to give to them the same interpretation, but when these rules are departed from, the imagination, untrammelled by principle, is permitted to guide the judgment, there is no uniformity, no certainty in decision. These rules, I understand as deserving equal deference and respect with other portions of the common law, and are supposed to be in the contemplation of the law giver, when he gives his assent to the enactment of a law;

JULY 1829.

Winston  
v.  
Moseley.

a Page 380.

hence the propriety of adhering to them, that the will of the legislature may be ascertained. In addition to the rules already considered, I will consider several others as applicable. In 6 Bacon, <sup>a</sup> it is said, "the most natural and genuine way of construing a statute is, to construe one part by another of the same statute: for this expresseth the meaning of the makers, and such construction *ex visci-bus actis*. The same author says in the same page, "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. But if from a view of the whole law, or other laws *in pari materia*, the evident intention is different from the literal import of the words employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature."

The principles laid down in these quotations so fully and clearly express their own meaning, that they do not need the explanation and illustration of argument; by applying the reasoning employed, to the effect of the first and second sections of the act of 1812, considered separately and conjointly upon the act of 1807, the mind is drawn to the conclusion, that the negotiable quality of cotton receipts, imparted by the latter is not impaired by the former, and that the principles of commercial law, which give character to inland bills of exchange, must guide the opinion of the Court in determining upon the admissibility of the sets off offered by the defendant.

From the record it appears that the cotton receipt was assigned to the plaintiff, on the day on which it was made; that the defendant then had a note of the plaintiff's indorser, and afterwards, and before notice of assignment to the plaintiff, acquired another demand against him. It does not appear that the plaintiff had notice, before the transfer to him of the cotton receipt, of the claim of the defendant to any set-off. According to mercantile law, the indorsee of a bill, indorsed before due, receives it on its own intrinsic credit: It is immaterial to him what may have been the state of accounts between his indorser and any of the other parties to it. If he is not cognisant of them, he takes it divested of all right of discount or set-off, which it was subject to in the hands of his indorser.

Cotton receipts, I have said, were governed by this rule; and the facts on the record, authorising its appli-



JULY 1872.

Winston  
v.  
Moseley.

cation, this Court are of opinion, that the Court below should have instructed the jury that the defendant's set-off was not allowable against the plaintiff. That Court having given instructions different from the law as declared here, the judgment is reversed and the cause remanded.

Judge SAFFOLD, dissenting.

Judges CRENSHAW and WHITE, not sitting.

NOTE.—This opinion was delivered after the cause had been retained by the Court, under an *advisare*.

### ECHOLS v. DERRICK.

- A. purchased at sheriff's sale, without notice, a slave which had been previously conveyed by deed in trust. The deed had not been recorded in the manner required by the statute of frauds. But, after the sheriff's sale, and before the expiration of twelve months from the date of the deed, the trustee sold the property and executed the trust. It was held.
1. That the necessity of registry in such case is dispensed with, the term of twelve months allowed for registry not having expired.
  2. That the adverse possession of A. under his purchase, made no difference, and did not prevent the trustee from executing his trust.

WILLIAM DERRICK brought an action of trover in Madison Circuit Court, against William Echols, to recover the value of a slave named Lewis. At the spring term, 1827, of the Court, on the plea of not guilty, a verdict and judgment were rendered for the plaintiff, for \$543 42, damages.

By abill of exceptions taken by the defendant at the trial below, the facts proven appear to have been as follows: One William Fleming, sold and delivered to one David Royster, certain slaves, among whom was one named *Jim*; and to secure the payment of the purchase money, Royster executed a deed of trust of the negroes in Fleming's favor. Royster being in possession, sold the slave *Jim* to Derrick, the plaintiff below. Soon after, Fleming, hearing of this, informed Derrick of his lien on the negro, which was the first notice Derrick had of its existence. Royster, then,

JULY 1829.

Echols  
v.  
Derrick.

to secure Derrick in his purchase, executed, on the 29th of March 1823, a deed of trust of another slave named *Lewis*, (the slave sued for,) to one William Roundtree, as trustee, with condition that the slave *Lewis* should remain in Royster's possession till the title to Jim failed, in which case the trustee was to sell him, to reimburse Derrick for his loss. The parties resided in Madison, and both the deeds were recorded, but neither of them had been proved or acknowledged in open Court, as required by the statute of frauds, but were admitted to record on probate made before the clerk of the County Court only. After the making of those deeds, Echols, the defendant below, obtained a judgment and execution against Royster, and the sheriff, under this execution, levied on the slave *Lewis*, and sold him as the property of Royster, and Echols became the purchaser, obtained the possession, and has retained him ever since. After this sale, Royster failed to pay Fleming, and Jim was sold under the deed of trust to satisfy his claim, and Derrick bought him. Derrick then procured Roundtree, his trustee, to sell *Lewis* under his deed. At the sale of *Lewis*, Echols attended and gave notice of his claim and previous purchase, and forbid the sale; but the trustee proceeded, nevertheless, to sell him, and Derrick bought him also. The sales made under the deeds of trust, were both made within one year from their respective dates. Upon this evidence, the defendant below moved the Court to instruct the jury, that if they believed from the evidence, that the plaintiff had no actual notice of the deed of trust for the benefit of Fleming, when he purchased and obtained possession of the boy Jim, and paid his price to Royster, that the title of said Derrick was good against the lien of Fleming, unless his deed of trust had been proved or acknowledged in the County or Circuit Court of Madison, and recorded in twelve months after its date; and consequently, that the plaintiff purchased the boy Jim in his own wrong, and could not thereby acquire a right to sell *Lewis* under his deed. Also, that unless the deed of trust to Roundtree had been proved or acknowledged in the County or Circuit Court of Madison, and recorded in twelve months from its date, it was inoperative against a judgment creditor of said Royster. But the Court refused so to charge, and on the contrary, instructed the jury, that although the clerk of the County Court had no authority to receive probate or acknowledgement of the deeds in question, yet if

JULY 1829.

Echols  
v.  
Derrick.

they should be satisfied from the evidence, that the sales had been made under those deeds within twelve months from their dates, respectively, that the title of the purchaser would be good, and could not be affected by a failure to prove and record them afterwards; and that the *cestuy que trust* being the purchaser, would make no difference, nor would the adverse possession of the defendant, under his purchase, vary the case, or affect the title of the plaintiff. Echols now here assigns for error, that those instructions were improper.

*a* Laws of Ala.  
p. 244.  
*b* Astor v.  
Wills, 4  
Wheaton 466.  
488.  
*c* Ibid. 487.

KELLY and HUTCHISON for the plaintiff in error, argued that the deeds of trust were improperly admitted to record; that the statute requires such deeds to be proved in open Court, *a* that therefore the registry was a nullity, and could not operate as constructive notice; *b* that Echols was a *bona fide* purchaser without notice, and that the conveyances as to him were good; *c* that the execution of the trust could not operate in a case like this, when the deed of trust was not regularly registered, and the defendant had adverse possession as a purchaser without notice.

McCLUNG, for the appellee.

By JUDGE WHITE. The first inquiry is, whether Derrick, by purchasing the boy Jim of Royster, without *actual notice* of Fleming's lien, acquired such a title as to render it useless, and therefore prejudicial to Royster's creditors, for Roundtree to execute the trust in the deeds to him, by the sale of Lewis for the indemnity of Derrick? If this were the case, Fleming's rights would have been prejudiced without any default on his part. He certainly was authorized to take the deed with the condition it contained, and to permit the property to remain with Royster; nor could it be expected that he should know by anticipation, who Royster designed selling him to; and therefore could not be required to give actual notice to prevent imposition. There is no evidence that he connived at, or even knew of Royster's intention to sell to Derrick, before the sale; on the contrary, his conduct after that event, in notifying Derrick, shewed fairness of intention in him, and had the effect to induce the latter to adopt a measure which prevented his ultimate injury. The law did not require Fleming to prove his deed in open Court and place it upon record to give constructive notice under

JULY 1829.

Echols  
v.  
Derrick.

twelve months, and as that time had not transpired when the sale took place, he was in this also without default. We are not then prepared to say that Fleming's title to Jim could have been destroyed by the establishment of Derrick's, when Fleming did nothing but what the law permitted, and left undone nothing which it required; nor can we conceive, that the proof and registration of his deed, according to the provisions of the statute of frauds, after the sale, if embraced by them at all, could have answered any efficient or valuable purpose. But it is said, that the deed made to indemnify Derrick against loss, by failure in the title to Jim, not having been proven in open Court, and recorded, could not prevail against Echols, who was a judgment creditor of Royster, though his judgment was subsequent to the date of said deed. This objection is also met by the fact, that the twelve months given by law to prove such deeds in open Court and have them recorded, had not elapsed when the sale under the deed was made. This being done, its force was spent, its design effected by the execution of the trust, and none of the intentions of the law could have been answered by its subsequent proof and registration. We are therefore of opinion, that there was no error in the judgment of the Circuit Court.

Judgment affirmed.

JUDGE SAFFOLD, not sitting.

26 147  
108 374

### LUCAS V. THE BANK OF GEORGIA.

1. A corporation created in another State, may sue in this State.
2. To establish the existence of an incorporated Bank in another State, a copy of its charter, and parol proof of its being in operation, will be sufficient.
3. Where a suit is instituted by a corporation, can the authority of the attorney who institutes it, be inquired into? *Quære.*
4. Profert of the authority of the attorney being made in the declaration, the defendant, by pleading the general issue, waves the right to inquire into it, if such right did previously exist.

THE President, Directors, & Co. of the Bank of Georgia, by their attorneys in fact, G. R. Clayton and E. Cary, brought an action of assumpsit, in Montgomery Circuit

JULY 1830.

Lucas  
v.  
The Bank of  
Georgia.

Court, in August 1825, against Henry Lucas, to recover on a note made by him for \$1680, dated the 14th June, 1820, and payable at six months, to the order of John Lucas, at the Branch Bank of the State of Georgia, in Milledgeville. The note was indorsed by John Lucas, to one S. Goodall, and by him to the plaintiffs. The plaintiffs declared by attorney, and made profert of the letters of attorney under which their agents acted; and the defendant pleaded the general issue. At March term, 1826, the issue was tried, and a verdict was found for the plaintiffs.

The defendant, on the trial, required the production of the warrant of attorney or authority by which the suit was instituted, and moved the Court to *non pros* the plaintiffs, if it was not produced. The Court overruled the motion, being of opinion, that at that stage of the cause, no authority was necessary to be produced. The plaintiffs produced the note and an authenticated copy of the act, incorporating the Bank in Georgia. They also proved by the deposition of a witness, that a Branch of the Bank of the State of Georgia, was established in the town of Milledgeville, and was in operation before the date of the note sued on, and was still in operation. This was all the evidence offered of the existence of said corporation. The defendant objected to the admissibility of the evidence, and also requested the Court to charge the jury, that it was insufficient to shew that the plaintiffs were a body corporate, and to entitle them to sue in this action. But the Court ruled that it was admissible and sufficient. To all which the defendant Lucas excepted, and he now assigns those several decisions of the Court below, as errors.

HITCHCOCK, GOLDTHWAITE and THORINGTON, for the plaintiff in error.

ROCKWELL, GORDON and BUGBEE, for the appellees.

By JUDGE COLLIER. In the argument of this cause, three points were made by the plaintiff in error.

1st. That the warrant of attorney, or other authority, by which the corporation was represented in the Court below, should have been produced. 2d. That there was no legal proof that the plaintiffs were a corporation. 3d. That a foreign corporation cannot sue in the Courts here.

When the cause was called for trial, and before the de-

JULY 1829.

Lucas  
v.  
The Bank of  
Georgia.

a Minor's Ala.  
Rep. 54.

declaration was read to the jury, the defendant below moved the Court to require the production of the warrant of attorney, or other authority, by which the plaintiff was represented there, and in default of its production, called upon the Court to *non pros* the plaintiff.

This Court, in *Gains et al. v. the Tombeckbe Bank*,<sup>a</sup> after speaking of the manner of appointing attorneys to appear in Court, by corporations and natural persons, employ this language: "But is there any reason for requiring this authority to appear in a suit, by a corporation, more than in one by a natural person. In either case, the authority of the attorney rests with the party he represents, and the Court. The adverse party has no right to question it. The corporation cannot act *in pais*, but by its common seal, but as much as a natural person, is estopped from denying the acts of its attorney of record." Without permitting ourselves to scan the opinion pronounced by the Court in that case, with a view to its legal correctness, we are willing that the doctrine of *stare decisis* shall control our opinion upon this point, until we shall be satisfied that great injustice will result from its continued recognition.

If however it were conceded, that an attorney professing to represent a corporation should be required to produce the warrant of his appointment, we would say, that in this case it had been admitted, or the right to demand its production waved *by pleading the general issue*.

The note on which this action is brought, is payable to John Lucas, at the Branch Bank of the State of Georgia, in Milledgeville. To prove the existence of the corporation, the plaintiff offered in evidence in the Court below, the act of incorporation passed by the Legislature of Georgia, authenticated pursuant to the act of Congress; and a deposition, which conduced to prove the establishment of a Branch of the Bank of the State of Georgia, in the town of Milledgeville, before the date of the defendant's note; and that it was still in operation. The defendant moved the presiding judge to instruct the jury, that the evidence was not sufficient to show that the plaintiff was a body politic, which instruction was refused. The act of incorporation created a body politic, by the name and style of "the President, Directors and company, of the Bank of the State of Georgia," and gave to them the right to commence Banking operations, so soon as a certain amount of stock should be subscribed and paid for; and

JULY 1839.

Lucas  
v.  
The Bank of  
Georgia.

a 8 Johnson's  
Reports 378  
marg. page. 1

authorized "the President, Directors & Co." in six months thereafter, to establish an Office, or Branch, for purposes of discount and deposit, at Milledgeville.

It was certainly a part of the proof of the plaintiff below, to make out his right to sue, by adducing evidence as to a corporative character: "Proof that the Bank had commenced business, was evidence, *prima facie*, that the conditions on which the charter was to become operative, had been performed. The commencement of business by the Branch, as shewn by the deposition of the witness, when coupled with the charter, is evidence that the principal Bank had an actual existence; for unless it had, the Branch had no legal being.

The books of the Bank would not be the best evidence to shew the amount of stock subscribed and paid for, and it may well be questioned whether they would have been evidence at all, against the defendant below. They are the private papers of the Bank, with which he has had no concern, and I should therefore apprehend that he could not be concluded as to the facts they exhibited, unless he was a member of the corporation.

b 1 Starkie  
298.

If the note had been made directly to the Bank, no evidence could have been required to prove the actual existence of the corporation, since it would thereby have been admitted. As the note is only payable at, and not to the Bank, the question may perhaps be varied. But the testimony which went to the jury, being deemed sufficient on this point, it is unnecessary for the Court to express an opinion upon the effect of the recital in the note.

With regard to the last point, this Court is of opinion, that the plaintiffs might maintain an action in the Courts of this State. "In fact, so far as our researches have extended, the question never seems to have been seriously agitated. The cases of foreign administrators and executors, and of commissioners of foreign bankrupts, to which the plaintiff in error has referred as analogous in principle, seem to us to be entirely dissimilar. The reason why these cannot maintain actions in our Courts, is because their appointment, which is designed to operate a transfer of the credits and effects of those they represent, cannot have that effect *extra territorium*. The laws here, have a control over their property as against a foreign assignment by act of law, and will exercise that control with a view to the benefit of resident creditors. In the present case, the debt accrues to the Bank in Georgia, by the act

c 2 Randolph  
471. 1 Strange  
612. 2 Strange  
807. Christy's  
Dig. (Louisiana,  
title corporation.  
4 Johnson's  
ch. Rep. 370.

JULY 1829.

Lucas

v.

The Bank of  
Georgia.

of the maker of the note, and not of the law, and cannot be discharged by his withdrawal without the jurisdiction of that State. No act of his, independent of, and unauthorised by his creditors, can impair his legal and moral obligation to pay the debt.

The defendant in error does not ask to be permitted to interfere with the legal rights and immunities of our citizens, but only invokes the remedy which we give to them, for the attainment of an undisputed right, or if disputed, only by the debtor. Great Britain, in periods of war, has closed her forums against an alien enemy; but in times of peace, they are always open to foreign creditors, whether natural or artificial persons. The Dutch trading companies have prosecuted their rights there, and doubtless other foreign corporations have done the same.

Apart from other arguments, this Court would find itself constrained, by considerations of international comity, to accord a permission to the corporation of another government to prosecute suits in our Courts, and more especially when, by doing so, the rights of our own citizens would not be affected.

The Court can discover no error in the case as presented.

Judgment affirmed.

JUDGE TAYLOR presided below, and did not sit.

---

### LUCAS V. COPELAND.

In debt on the record and judgment of a recovery in a sister State, a plea alleging that such judgment was entered of record by a deputy clerk, fraudulently, and by reason of a combination with the plaintiff for that purpose, is bad or demurrer, and may be stricken out on motion.

JOHN COPELAND instituted three suits of debt in the Circuit Court of Montgomery county, in 1825, to recover of Henry Lucas, on the records of three several judgments, which he had obtained against him in the Superior Court of Hancock county, in Georgia. The defendant pleaded a variety of defences. In each case a plea was filed, reciting "that the said supposed judgment and recovery was never legally obtained, but was entered of record in the



JULY 1829.

Lucas  
v.  
Copeland.

said Superior Court of Hancock county, in the State of Georgia, to wit, in the county aforesaid, at the time in that behalf mentioned in the declaration of the said plaintiff, by one Rhodius Nichols, a deputy clerk of the said court, in consequence of a fraudulent combination between the said Nichols and the said plaintiff, to defraud the said defendant, &c." with a verification. In one of the cases, the plaintiff demurred to this plea, and in another, moved to strike it out; and in both cases, the plaintiff, in the Court below, prevailed. Those decisions, are here by Lucas, assigned for error.

GOLDTHWAITE, for the plaintiff in error, argued that *nul tiel record* was not the only proper plea, <sup>a</sup> and that this plea was a sufficient bar to the action. <sup>b</sup>

BUGBEE, for the defendant.

By JUDGE SAFFOLD. The only ground for reversal now insisted on, is, that there was error in either striking out the plea of fraud on motion, or sustaining a demurrer to it. The obvious tendency and design of that plea was, unless it be regarded as a mere quibble in pleading, to deny the verity of the record in the sister State; to admit its existence and apparent regularity, but deny its validity; to admit the transcript of the record to be in the ordinary and legal form, that the attestation of the clerk, and the certificate of the presiding judge, were genuine, and given in the form and manner prescribed by the act of Congress, yet to insist that the judgment is spurious; that the turpitude and dexterity of a deputy clerk, has eluded the vigilance of the judge and principal clerk, or that his prowess has placed them at defiance, and enabled him to enter up a judgment, without the sanction, and against the authority of the Court.

This is truly a novel defence: yet it has been urged with abilities and ingenuity worthy a better cause. It has however, been sufficiently answered by the adverse counsel. Both sides have claimed advantage from a decision of this Court, rendered a few days since, in the case of *Hunt and Condry v. Mayfield*. <sup>c</sup> It is not believed that any principle recognized in that case, can afford the slightest sanction to this defence. By that decision, the doctrine was advanced, that in a case like this, the only proper general issue, is the plea of *nul tiel record*;

a 4 Cowen 480.  
b 13 East 409.  
13 Mass. 157.  
Phil. Evid.  
242. 15 Johnsons 145. 19  
Johnsons 162.  
2 Kent's Com  
91. Cokes  
Rep 78. Farmers Case. 2  
Starkies evid.  
Title fraud  
585.

c Ante, p. 124.

JULY 1839.

Lucas  
v.  
Copeland.

but in cases where the Court had not jurisdiction over the person of the defendant, or over the subject matter of controversy, the general issue was not the only proper plea; that in such cases, or where a judgment is absolutely void, the defence may be made by a special plea in bar, or in some cases, under the general issue. The general propositions were at the same time maintained, on the authority of the Supreme Court of the Union, and in which it was said, most of the States, and even New York had nearly or entirely concurred, that judgments of a sister State should have the same *credit, validity and effect*, in every other Court in the Union, that they were entitled to in the State where rendered; that such pleas as could be there pleaded, and none others, were admissible in any other Court of the United States; and that there can be no averment in pleading against the *validity* of a record, though there may be against its operation. <sup>a</sup>

a 3Wheat 214.  
4 Cowen 29.  
1 Peters 686

Then the question recurs, does not this plea directly impeach the *faith, credit* and *validity* of this record? It admits of no other interpretation, and is clearly forbidden by the Constitution of the United States, Art. 4. Sec. 1. "That full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of every other State; and that Congress may, by general laws, prescribe the manner in which such acts, records and judicial proceedings shall be proved, and the effect thereof;" and with the provisions of the act of Congress in pursuance thereof, passed in 1790, declaring that the record of a judgment from another State, shall have the same faith and credit in each State, that it has in the State Court in which it was rendered.

The plea must be understood as admitting the jurisdiction of the Court in Georgia, and that the process was duly served upon the defendant, as well as the apparent regularity of the proceedings, because neither is denied. If the plea could be regarded as one, amounting in substance only, to the general issue, it was equally inadmissible, as being irregular and unnecessary; and for the additional reason, that the defendant, having at the same time a formal plea of the same kind, is not permitted to encumber the record with a multiplicity of similar pleas.

It is not intended on this occasion to decide in the abstract, that in all cases where suit may be brought on a judgment from another State, the plea *per fraudem* is inadmissible; for the proposition to that extent is unnecessa-

JULY 1889.

Lucas  
v.  
Copeland.

---

ry to the decision of this case; and it is conceived improper to embarrass a subject of this importance, by anticipating questions that may necessarily arise for future discussion. If it were admitted, that in a State like Pennsylvania, where there is no special chancery jurisdiction, and the Courts of law must afford all the relief in any case, that can be sought from the judiciary, the *truth* of the record may be impeached by a plea at law, it does not follow that the same can be done in States which have distinct chancery jurisdiction, more adequate to investigate frauds, accidents, or mistakes. Or, were it admitted, that in cases where it does not appear that the defendant had notice of the pendency of the suit, or was not a party to it, but affected by it; or where the nature of the proceedings was *ex parte*, as in granting administration, or the like, that there, the plea *per fraudem* would be admissible, these concessions would not prove that the same defect can be sustained where there is no question as to the jurisdiction of the Court, the parties to the suit, the apparent regularity of the proceedings, or their authentication. In cases of the latter description, though the matter in contest may have passed in *rem judicatem*, yet the Court may have had no jurisdiction, or it may have been *res inter alios acta*, so that the defendant had no opportunity to resist the judgment or to assert his rights.

In any view that can be taken in this case, the plea is considered bad and inadmissible, and so entirely insufficient, that there could be no error, either in rejecting it on motion, or overruling it on demurrer.

By JUDGE COLLIER. In the opinion of the Court just expressed, it is intimated that the judgment of a sister State, when sued on in the Court here, cannot be avoided by pleading that it was obtained by fraud, when it appears from the record, that the defendant was served with process there. With entire respect, I must be permitted to maintain the converse of that proposition.

I grant that the judgments of the States of this Union, when sued on without the State where rendered, are entitled to a consideration in point of dignity, equally high and conclusive, as in the State from whence they are taken. A sensible and operative construction of the Constitution and act of Congress, conduce to this conclusion; and the Supreme Court of the United States, by its decision in the case of *Mills v. Duryee*, have put the question beyond controversy.

JULY 1839.

Lucas  
v.  
Copeland.

---

But neither the Constitution nor act of Congress bear on the question. It is to be settled independent of their influence, by the rules extracted from English adjudications, on the character of home judgments. These teach us, that such judgments are conclusive evidence of the verity of the facts they import. That when sued on, no defence is admissible which negatives matter intrinsic; because these matters were *res adjudicata*, and conclusively evidenced to be so, by the record. But they furnish no authority for a decision, calculated to effect such superlative injustice as that which determines that the party is also concluded as to matter extrinsic, which had not before been adjudicated. Such a decision, had one ever been made, could never have acquired the force of authority in Westminster Hall, the *rules which regula'te meum and tuum, are there too well defined, and the doctrine of moral and municipal justice too well ascertained*. The true rule then is, that any matter which constitutes, if true, a good defence, and did not impugn the verity of the record, is admissible. Fraud has always been a much favored defence by the common law; such is the detestation in which that law holds it, that it declares it shall vitiate every transaction into which it enters, even the most solemn acts of the Courts of justice. <sup>a</sup>

<sup>a</sup> 2 Starkie  
588. 1 Starkie  
252. Kent's  
Com. 91.

The learned counsel, who argued the case of *Mills v. Duryee* in favor of the conclusiveness of the judgment, employs this language: "But the defendant must either distinctly deny the record, avoid it by pleading *per fraudem*, satisfaction," &c. <sup>b</sup> Fraud does not contradict the record; it presents to the Court new and extrinsic matter, and asks that the judgment may be annulled for that cause.

<sup>b</sup> See also  
*Shumway v.*  
*Stillman* 4  
*Cowen*.

The distinction which was taken in the argument, between the right of parties and strangers, to avoid, has no foundation in sound reasoning. The stranger can avoid because he was not a party to the record, and therefore could not have defended himself against the fraud. The party had no notice of the fraud, and therefore could not have counteracted it before judgment.

Without undertaking to specify any particular fraud which would avoid a judgment, it is enough to say, that any facts and circumstances shewing that the defendant was circumvented by the employment of covinous and fraudulent means, by the plaintiff, or his agents, done with a view to gain an advantage of him, and that such advantage is gained, would render the judgment null.

JULY 1829.

Lucas  
v.  
Cresland.

---

Can it be true, that a party against whom a judgment is fraudulently obtained, is remediless; or am I to be told that chancery extends her protecting arms to his relief? This cannot be, for that tribunal only lends her aid where the forums which administer law according to strict justice, are incompetent to give relief because of their constrained application of the general canons of right to each particular case. Does this case form such an exception? I apprehend not. The general principles of law control the adjudication of both Courts. The powers of the two Courts, on questions of fraud, when the fraud can be discovered, are co-ordinate. If the defence be not authorized by law, equity cannot, therefore, interpose. To affirm its right to do so, supposes that chancery can administer relief where the law is deficient, by making rules for the decision of each particular case. This idea prevailed at the first institution of Courts of Equity, but has been exploded by more correct notions of jurisprudence. The idea advanced in argument, that the plea of fraud is tantamount to that of *nul tiel record*, and therefore demurrable, is not well founded. It might, with equal propriety be said, that the plea of fraud to debt on bond, is in effect *non est factum*, and therefore bad.

But on the sufficiency of the plea in this case, I concur in the opinion of the Court, and am therefore, for affirming the judgment.

By JUDGE PERRY. I concur in the views taken in the opinion delivered by Judge Collier.

JUDGE CRENSHAW, not sitting.

Judgment affirmed.

#### INNERARITY V. KENNEDY AND KITCHENS.

1. In an action of trespass to try titles, a deed made to the plaintiff, as administrator, is admissible evidence.
2. The words, "as administrator," are to be considered as *descriptio personae*, merely.

JAMES INNERARITY, in 1827, brought an action of trespass to try titles, against Joshua Kennedy, in Mobile Circuit Court; to recover the possession of a piece of ground in the city of Mobile. Samuel Kitchens was, by consent,

JULY 1830.

Innerarity  
v.  
Kennedy and  
Kitchens.

---

substituted as defendant to the action, and pleaded the general issue; and at the special February term, in 1828, of said Court, a verdict was found for the defendant. By a bill of exceptions taken by the plaintiff at the trial, it is shewn, that to support the issue on his part, the plaintiff offered in evidence, a deed made by William E. Kennedy, dated the 2d of March, 1820, which recites, that whereas he claimed a certain lot of seven acres, under a sale made to him by one Baudin, who held it under a title from the Spanish Governor, Gayoso, dated in 1798; and whereas, by articles of agreement made in 1806, between the said Kennedy and the late Joseph E. Collins, deputy surveyor of West Florida, who had also a permit or order of survey for the same land, it was stipulated that they should divide the tract between them, so that the northern part should belong to Kennedy, and the southern part to said Collins; with a further stipulation, that Kennedy should fence, ditch and improve the land, to prevent its forfeiture; and reciting that he had given evidence to the land commissioners, that he had done so, under his particular claim, no such evidence having been given by the person who claimed for Collins; and whereas, Innerarity, the plaintiff, had been appointed in Mobile, administrator of Collins' estate; that from regard to the memory of Collins, and for the further consideration of one dollar, paid by James Innerarity, administrator of said estate, he the said William E. Kennedy did bargain, sell, remise and quit claim to "James Innerarity, administrator of said estate, and to all, and every, and each person, who should purchase the said described premises, or any part thereof, at an administrators' sale of real estate, made in pursuance of the laws thereto applicable, and the legal order of the Court having the power to make such order, and all, and every, and each of their heirs," all the right he then had, or thereafter might have to the southern half of said premises, according to said articles of agreement, which he thereby ratified and confirmed, together with all the reversions, &c. and all his estate, both at law and in equity, &c." To which was added a covenant, that if a further title of confirmation or patent was obtained from the General Government, for the said land, that he and his heirs were bound to execute such further conveyances to "said J. Innerarity, administrator, or to his legal assigns, or the heirs of said Collins, as the case of right should be, as they or any of them should demand for the premises."

JULY 1839.  
 Innerarity  
 v.  
 Kennedy and  
 Kitchens.

To this deed, Joshua Kennedy was a witness, and it was acknowledged before the clerk of the inferior Court of Mobile county. The article of agreement referred to was appended to the deed; it purported to be a grant of the one half of the premises above described, to be held by Kennedy, on condition of his fencing and ditching the lot immediately, to prevent its forfeiture. The defendant's counsel objected to the said deed as evidence, and the Court, on the ground that the deed conveyed no legal title to the plaintiff, rejected it. This was the error assigned by Innerarity, the plaintiff in this Court.

ACRE, for the appellant.

ELLIOTT, for the appellees. The deed was properly excluded; the *probata* should legally correspond with the *allegata* contained in the declaration. The plaintiff declares for the lands *in his own right*, and produces a deed executed to him in his fiduciary character, and as administrator of the estate of Collins; and this deed is made in conformity with the articles of agreement made with Collins in his lifetime, and which constituted the *sole consideration* for making it.

The fact that the articles of agreement were the only evidence of consideration, and in fact, constituted a part of the deed itself, proves that the words "*as administrator of, &c.*" were not intended as the plaintiffs' counsel insist, as *descriptio personæ*; but that they were used *ignorantia juris*, to pass the estate to the heirs of Collins. This was the intention; but this the plaintiff has entirely disregarded, and has sued in his own right. At law, if the deed could have any validity, it could only be as evidence in an action brought by the plaintiff in his representative capacity. <sup>a</sup> The plaintiff is bound to elect the right under which he will claim, he cannot in the same action, claim the fee, and also claim as trustee for the heirs at law. But we contend, that at law, the deed is a nullity; though in equity, it might be otherwise. The deed does not pass the estate to the plaintiff in his own right, and it cannot support his action; he must recover on the strength of his own title, and not on the weakness of his adversary's, <sup>b</sup> and his title must be a legal title, and not only a legal title, but he must establish a right in himself, to enter, to possess, and to enjoy; this the deed certainly does not shew. <sup>c</sup>

<sup>a</sup> 2 Starkie  
516.

<sup>b</sup> 2 Starkie's  
E. 514.

<sup>c</sup> 2 Starkie  
506.

JULY 1880.

Innerarity  
v.  
Kennedy and  
Kitchens.

By JUDGE COLLIER. The material question for the Court to determine, is, whether the deed of William E. Kennedy to the plaintiff should not have been permitted to go in evidence to the jury in the Court below. The deed contains several recitals, descriptive of the lot conveyed, and declaratory of the cause of the conveyance, none of which it is conceived impair its *validity*; and then conveys the lot to the plaintiff, as administrator of J. E. Collins, deceased, and covenants that if the grantor's title to the lot shall be confirmed, or a certificate of confirmation issue therefor from the United States Government, that then he will, if necessary, make further assurance of title. The lot conveyed is south of the thirty first degree of north latitude, east of the Pearl, and west of the Perdido river. The grantor in the deed refers to his title as emanating from the Spanish Governor, Gayoso, in seventeen hundred and ninety-eight. This deed, in the opinion of the Court, conveys to the plaintiff, all title which was vested in the grantor, and there is nothing, on the face of it, which discovers that the legal title was not vested in him. The covenant for further assurance, if further assurance were unnecessary to pass the legal title, would be rejected; whether it was, the Court is unprepared from the facts to say.

The deed, it has been remarked, makes a conveyance to the plaintiff as administrator of J. E. Collins, deceased, and hence the defendant has argued, is not admissible for the plaintiff in this action in his individual capacity. This argument, it is believed is not sustainable; describing the plaintiff as administrator, can be viewed only as a *designatio personæ*.<sup>a</sup> The legal interest is vested in him individually, and it is competent for him to use the deed as evidence in an action where his representative character is not noticed on the record. The plaintiff will be answerable over, should he recover, to the heirs of his intestate; but that circumstance cannot form matter of legal defence to the plaintiff's action. So strict is the regard paid in Courts of law to the legal title, that a trustee is permitted there, to maintain an action to try title against his *cestui que trust*.<sup>b</sup> If the deed had been made to the plaintiff in his individual character, and he had described himself on the record as administrator, we apprehend the proof would have been variant from the allegation, and he must have failed in his action; but such a case is not analogous to the one we are considering. We are of opinion that the Court

<sup>a</sup> 1 Peters 697.

<sup>b</sup> Adams' Ejectment 323.



JULY 1820.  
 Innerarity  
 v.  
 Kennedy and  
 Kitchens.

---

erred in not permitting the deed to go to the jury; its sufficiency to prove the issue is not presented to us, but only its admissibility; and on that point is our opinion expressed. The judgment is reversed and the cause remanded.

---

### TAYLOR V. RUSHING.

1. The lessee of a ferry is the person liable to the penalty of \$10, imposed by the statute of 1820, for neglect.
2. But where a person is employed on shares, and for an indefinite time, though he has the exclusive control and management during his employment, yet he is to be considered as a servant, and not a lessee; and the owner is liable.
3. When a penalty has accrued to an individual, under a statute, it is a vested right, and the repeal of the statute pending a writ of error does not divest it, but the Court may go on to render a judgment.

THIS was an appeal tried in the Circuit Court of Autauga county. George Taylor had obtained a judgment against B. Rushing, as the owner of a public ferry, for ten dollars, as a penalty incurred by reason of his being detained at the public ferry of said Rushing. On the trial of the appeal, the proof was, that the ferry belonged to Rushing, and had been regularly established by the County Court; that in May, 1826, the plaintiff had been detained two hours on account of the absence of the ferryman. It was proved that before and after this time, Rushing kept the ferry himself, but that at this time one Allen was keeping it; that he had been engaged by Rushing to do so, and that they were to share the proceeds, as also the profits of a hatter's shop, which Allen carried on at the same time; that Allen was to have the entire control of the ferry, but he did not give to Rushing any bond or obligation to keep it according to law. No specific time was fixed by the agreement, during which Allen should keep the ferry, but it was understood he would keep it a year; he did not, however, keep it a year; but soon after the above named time, he declined keeping it any longer. On this proof, the Circuit Court gave judgment for the defendant, on the ground, that as Allen had the whole control of the ferry, it was tantamount to a lease of it to him, and that the

lessee was the person liable to the penalty under the statute. This decision is assigned for error by Taylor, who sued his writ of error to this Court.

JULY 1830.

Taylor  
v.  
Rushing.

THORINGTON, for the appellant.

FITZPATRICK and GOLDTHWAITE, for the appellee.

By JUDGE PERRY. The penalty is claimed under the provisions of the statute, passed December the 20th, 1820, which is in these words: "And it shall and may be lawful, for any person or persons detained at any public ferry, by reason of the ferryman's not having good and sufficient boats, or other proper craft, and hands, or by neglecting to do his duty, may by warrant from a justice of the peace, recover from such ferryman, or owner of such ferry, the sum of ten dollars for every default or neglect." <sup>a</sup> Under this clause of the statute, the facts of the case present two subjects for our consideration. The construction of the agreement between Allen and Rushing, and whether it constitutes a lease; and the construction of the statute under which these proceedings were had. A majority of the Court are of opinion, that if Allen could be considered as a lessee, that then the defendant was not liable under the statute, according to the principle settled in the case of *Ladd v. Chotard*, decided in this Court. <sup>b</sup> But in applying the rules of construction to the agreement between Allen and the defendant, we have come to the conclusion that it does not constitute Allen a lessee, because there was no definite period of time, that he was to enjoy the ferry, in exclusion to the owner. Allen then having no right to the possession in exclusion of the owner, places him in the situation of a laborer for hire, to Rushing; and his having the entire control and management of the ferry, does not alter the construction of the agreement, and consequently, cannot diminish the liability of the owner. He will be held to a strict compliance with the statute, and it would be no excuse for him to say the detention was occasioned by his agent or servant, to whom he had given the management of his ferry. It is contended by the counsel for the defendant, that supposing he was liable under the statute of 1820, at the time of the rendition of the judgment in the Court below, he is not now liable, inasmuch as the Legislature, in 1827, passed an act to consolidate and reduce into one, the several acts concerning roads,

<sup>a</sup> Laws of Ala.  
p. 307.

<sup>b</sup> Minor's Ala.  
Rep. 346.

JULY 1829.

Taylor  
v.  
Rushmg.

a 5 Cranch.  
281.

b 1 Stewart.  
347.

highways, ferries and bridges, containing a repealing clause of all acts or parts of acts, contravening the provisions of that act. Without discussing the point, whether or not the law of 1820 was repealed by the law of 1827, a judgment may well be rendered against the defendant, for the reason, that the plaintiff's right to the penalty accrued, and became vested, previous to the law of 1827; consequently the legislature had no power to interfere with the private right which had accrued under the law of 1820. It is this feature in this cause, that distinguishes it from the case of *Yeaton and others v. The United States*,<sup>a</sup> and from the case of the *Tombeckbe Bank v. The State of Alabama*.<sup>b</sup> In the first case, the forfeiture was going to the general government. It was a suit between individuals and the government, and the law under which the forfeiture accrued, was suffered by the government to expire by its own limitation; consequently, the rights which the government acquired under it, ceased. The case of the *Tombeckbe Bank v. The State*, was similarly situated. A judgment had been rendered against the Bank in favor of the State, for a penalty created by an act of the legislature; pending the cause in this Court, the legislature repealed the law creating the penalty, without reserving the rights the State had acquired under it. The State having the interest in the penalty, it was competent for the legislature to discharge it. The Court are therefore of opinion, that the judgment of the Court below should be reversed, and judgment rendered in this Court for the plaintiff.

Reversed and rendered.

### MARTIN V. WHITE, Adm'r.

The possession of personal property, remaining with the vendor, where the bill of sale is absolute, is only *prima facie* evidence of fraud, and not fraud *per se*.

THIS was a writ of error sued by Willis Martin, who was also plaintiff below, to reverse a judgment rendered against him in the Circuit Court of Greene county, in an action of trover, brought by him against Asa White, administrator of George Evans, to recover five negroes,

which he claimed under a bill of sale, made by Evans to him. Many points were presented by a bill of exceptions, in which the Court below was alleged to have erred, one of which in this Court was deemed decisive.

JULY 1882.  
  
 Martin  
 v.  
 White, Adm'r.

SHORTBRIDGE, ELLIS and ERWIN, for the appellant.

VAN DE GRAAFF, for the appellee.

By JUDGE COLLIER. On the trial, the plaintiff relied upon an absolute bill of sale for certain negroes, from George Evans, deceased. The defendant, it appears, was the administrator of the decedent. Possession did not accompany the conveyance. On these facts, the presiding judge instructed the jury, that the bill of sale, if the negroes conveyed were not delivered, was fraudulent against creditors.

The Court, at this term, in *Hobbs, v. Bibb* <sup>a</sup> have decided that the possession remaining with the vendor, as it seems it did in this case, is not fraudulent, but only *prima facie* evidence of fraud. Upon the authority of that case, the Court are of opinion that the judgment below must be reversed, and the cause remanded; the bill of exceptions is so inartificially drawn, that the Court is unable to discover the pertinency of the other points on which the judge instructed the jury, and therefore declines an expression of opinion upon the legal correctness of his instructions.

<sup>a</sup> Ante p. 54.

Reversed and remanded.

JUDGE SAFFOLD, not sitting.

### COLLIER V. CHAPMAN, et al.

The answer of a defendant in Chancery, cannot be read at the trial as evidence against his co-defendant; particularly where it tends to invalidate a title made by himself.

In March 1822, James B. Collier filed his bill in equity in Madison Circuit Court, against Samuel Chapman, John M. Kinley, and James Birney, to subject certain negroes to the payment of a debt due by Chapman, to him.

JULY 1820.

Collier  
v.  
Chapman.

The complainant charged in his bill, that Chapman owed him the amount of four notes, each for \$500, payable in 1820 and 1821, and all executed on the 21st of December, 1819; that at the time of making the notes, Chapman also gave him a mortgage, to secure their payment, on five negroes named Harvey, Taylor, Cupid, Sally and Maria, which mortgage was not recorded; and by accident the mortgage had been so obliterated, that it could not be exhibited; that the defendant, Birney, and one Land, were subscribing witnesses to it; and that the debt remained wholly unpaid. He further charged, that Chapman, combining with the defendants, M'Kinley and Birney, on the 7th of January, 1820, executed a deed including the same negroes, to said M'Kinley, to secure to him the payment of a note for \$2,652, which they pretended was due by Chapman to M'Kinley, and to which Birney was security; that the condition of this deed was, that if Chapman did not pay said note in twenty-five days, that the negroes should be delivered to M'Kinley, who should keep them for twelve months, during which time their services should be received in lieu of interest on the debt, and that at the expiration of that time, either they should be sold to pay the debt, or that M'Kinley should take them in payment at certain specified prices, provided said Samuel could make a good title to them, at the option of said Samuel. He also charged, that at the time this conveyance was made, M'Kinley and Birney had full notice of the complainant's mortgage, and that it was contrived for the purpose of defrauding the complainant and securing Birney from loss by reason of his securityship; and alleged that the negroes were then in the possession of M'Kinley. The prayer of the bill was, that the negroes and their hire should be subjected to the satisfaction of the complainant's mortgage.

The defendant M'Kinley, answered, insisting that Chapman was really indebted to him the amount of the note of \$2,652, which was dated the 18th of December, 1819, to which Birney was security; and admitted that Chapman had, on the 7th of January, 1820, executed a deed of trust on seven negroes, named Harvy, Caswell, Taylor, Jim, Rix, David and Harriett, in which Birney was trustee, to secure the debt, with condition as stated by complainant; and that Chapman, having failed to pay him, did in February, 1820, deliver the negroes to him. He admitted that Chapman did at the time inform him that Collier held a

JULY 1839.

Collier  
v.  
Chapman.

---

mortgage or deed of trust on part of the negroes, which, he did not recollect, but that he also said that he had made arrangements to pay Collier, and that he would not resort to the deed. He further stated, that he remained in possession of the negroes without any further arrangement, till the 27th of December, 1821; that during that time he had frequently met the complainant who said nothing on the subject, although the respondent's deed had been recorded as early as the 13th of January, 1820; and that on the 27th of December, 1821, he applied to Chapman to close the business, and inquired of him if Collier had been paid, or if he relied on his mortgage, when he again told him that he presumed that the complainant had abandoned the mortgage, as he never had it recorded or said any thing about it, and that he had paid part of the debt; that upon this, having examined the records and found no mortgage recorded, he took Chapman's release upon his deed of trust, and surrendered his note to him. His answer further stated, that he did not admit the execution of any such mortgage as the complainant set up, and that he relied on the statute of frauds and perjuries in bar of the complainant's claim. He denied having any thing to do with Birney in the transaction, and alleged that the conveyance to him was *bona fide*, and taken solely for the purpose of securing his debt.

Chapman, by his answer, admits the existence of both debts, and that he executed a mortgage to the complainant of some negroes, he thinks four, names not now recollected, but who were part of those now in M'Kinley's possession; that he executed the deed to M'Kinley, delivered the negroes, &c. He stated, that when he executed the deed to M'Kinley, the mortgage to Collier was spoken of, and that he told him that he did not expect Collier relied on it; that he had never had it recorded. He denied that he had never paid any thing to the complainant, and insisted he had paid, on divers occasions, money and other things to a considerable amount, but what amount he does not now know.

Birney, in his answer, responds, that he believes he was a witness to the mortgage made to Collier; that at least he was present when it was executed; that as to the other deed he heard of it from both parties, but that he had no interest whatever in it, nor in the subject of controversy, and denies all collusion or concern with the subject.

JULY 1826.

Collier  
v.  
Chapman.

At the February term, 1824, on hearing the bill answers and proofs, \* the chancellor in the Circuit Court dismissed the bill as to M'Kinley and Birney, with costs; and in June 1826, a final decree was rendered in the same Court against Chapman, on the bill, answers and proofs, for the debt and interest, and subjecting the negro Cupid to sale towards satisfaction of the mortgage.

Collier, in this Court assigns for error, the dismissal of the bill as to the defendants M'Kinley and Birney in the Court below, and insists that a decree should have been rendered against them.

CAMPBELL, KELLY, and HUTCHISON, argued for the complainant, and cited authorities to shew that a purchase with notice of a prior unregistered deed, could not prevail against it. <sup>a</sup>

HOPKINS, for the respondents.

<sup>a</sup> Powell on Mortgages Ed. of 1822, notes 552, 3 Atk. 301. 635. Sugden on Vendors 511 to 533. 2 Ves. jr. 437. 2 Sch. & Lefr. 315. 2 Marshall 149. 2 Munf. 196. 6 Mass. 30. 9 John. 168. 10 John. 460. 3 Wheat. 449. 4 Wheat. 487. 5 Cranch 154, 167. Wheat. Dig. 178, 142.

By JUDGE CRENSHAW. This case as presented to the Court, involves important points, none of which it is deemed necessary now to settle, except to determine whether Collier's mortgage is sufficiently established by those rules which govern in a Court of equity, so as to bring it fairly before the Court. The bill alleges that Collier's mortgage has been so defaced and obliterated by accident, that it could not be exhibited. Chapman, in his answer, says he did execute the mortgage to Collier, he thinks for four negroes, being a part of those in M'Kinley's possession, the names of which he does not recollect. Birney answers, that he was a witness, or was at least present, when the mortgage was made by Chapman to Collier. If the answers of Chapman and Birney could be admitted as evidence against M'Kinley, then the existence of the mortgage alleged in the bill, is established.

The general rule is, that the answer of a defendant cannot be read in evidence against his co-defendant. To this rule, it seems there are some exceptions. The inquiry therefore is, whether the case under consideration, comes within any of the exceptions.

In the case of *Clark's Exr's. v. Van Riemsdyke*, <sup>b</sup> Judge Marshall lays down the proposition, that the answers of three copartners and joint-owners of a ship, though insolvent and discharged under the insolvent laws of a State, cannot be read in evidence, to charge the other

\* NOTE.—What the proofs were, the record does not disclose.

<sup>b</sup> 9 Cranch 153.

JULY 1889.

Collier  
v.  
Chapman.

joint-owner on a bill drawn by authority of the owners. In that case three of the defendants, who had taken the benefit of the insolvent laws, and who were copartners in merchandise, and joint-owners of the vessel with the other defendant, admitted in their answers that the supercargo of the vessel had authority to draw the bill in question. The Court excluded the answers as inadmissible to prove that the supercargo, as a partner, had authority to draw the bill. The Court also excluded their depositions, on the ground of their being interested witnesses, notwithstanding their discharge under the insolvent law. In the case of *Starling v. Blair*, \* Wilkinson being indebted to M'Ilvain, for the purpose of securing payment, gave a mortgage on certain lots in the town of Frankfort. The money not being paid at the time agreed on, M'Ilvain filed his bill against Wilkinson, and obtained a decree of foreclosure and order for sale, under which Starling purchased one of the lots. Blair then filed his bill against Wilkinson, M'Ilvain and Starling, alleging that prior to M'Ilvain's mortgage, he had purchased the lot of Wilkinson. The bill was taken *pro confesso* as to Wilkinson. The other defendants in their answer, did not admit, but required proof of Blair's purchase. The question then was, whether Wilkinson's admissions, implied in the order *pro confesso*, could be received as evidence to prove his previous sale to Blair. Chief Justice Boyle, in giving the opinion of the Court, says, "that if Wilkinson had answered and expressly admitted the contract, or sale to Blair, it could have no effect against the other defendants; 1st, because the answer of one defendant cannot be received as evidence against another; and 2nd, because the confession of a vendor, after he has parted with his title, is not admissible in derogation of the title in the hands of the vendee."

\* 4 Bibb 382.

If then this be sound law, the case of Chapman forms no exception to the general rule, and his answer cannot be read for the purpose of establishing Collier's mortgage; because this would be in derogation of his deed of trust and subsequent sale to M'Kinley.

It next becomes important to inquire whether Birney's answer, can be read in evidence against M'Kinley.

If he had no interest in the subject of litigation, or in the event of the suit, it was not necessary to make him a party, and his deposition might have been taken and used at the hearing of the cause, as that of an indifferent witness. 5

3 9th Cranch  
133.



JULY 1829.

Collier  
v.  
Chapman.

In 1st M'Cord's Chancery Reports, it is said, that after the trust has been executed, and the property delivered to those who under the deed are authorised to receive it, or in other words to the *cestui que trust*, the trustee need not be made a party. If this be good law, it may have some application to the present case: for the bill shews that the trust has been executed, and that M'Kinley has possession of the negroes as a purchaser, and in payment of his debt.

In 2nd Johnson's Chancery Reports, it is laid down, that if a party be made defendant *pro forma*, but has no interest in the cause, and in the 6th of the same author, that a party charged as combining with others in a fraud against which relief is sought, may be a witness for his co-defendant, and seems to deny the position that he can be a witness against him. In the case before us, the bill expressly charges "that the said conveyance, meaning the deed of trust, was contrived by said defendants to defraud the complainant, and to secure Birney, who was security for the payment of M'Kinley's debt." In the case of *Wilson v. Wilson*,<sup>a</sup> it was also decided, that the evidence of a trustee was inadmissible to destroy the deed of trust, to support which, was the sole purpose for which he was created.

a 1 Dessaus-  
ure.

The result of my researches and reflections, and on this subject they have been laborious, is, that Birney is so charged in the bill as to preclude his answer from being read in evidence against M'Kinley, and that without his answer, or the answer of Chapman, there is no sufficient testimony to establish the complainant's mortgage, set forth in the bill.

It appears from the record, that on the circuit, the case was heard on the bill, answers, and proofs; but what those proofs were, we are not informed by the record. If they were available to the complainant, he might have taken the necessary steps to bring them before this Court. A majority of the Court are for affirming the decree.

Decree affirmed.

JUDGE PERRY, dissenting.

JUDGE TAYLOR, not sitting.

JULY 1839.

## SMITH V. HEARNE.

Two writs of error having issued, the Clerk returned thereto one single record, containing two judgments. The record being properly applicable to neither of the writs, they should be dismissed.

N. SMITH, sued out two writs of error to the County Court of Clarke county, and gave two bonds to supersede the judgments below. The Clerk of the County Court returned the two writs and bonds jointly, and attached to them one transcript of record only. This transcript contained two judgments. It appeared that Smith had obtained two judgments before a Justice of the Peace, against C. Hearne; on two separate demands; that the defendant by one single petition, prayed for, and obtained a *certiorari*, from the County Court, to bring up both cases. There was but one *order* and *Certiorari bond*, for both cases; and they were returned jointly to the County Court, under one writ of *certiorari* only. At the January term, 1828, of the County Court, two judgments were rendered for the defendant, against the plaintiff, for costs. The whole was certified as one record only.

BAGBY and LYON, for Smith the appellant, requested errors.

PARSONS and COOPER, for the defendant, insisted that the writs of error should be dismissed.

By JUDGE COLLIER. In this case, two writs of error and two judgments, are certified jointly to this Court. The Court must consider the transcript as it is sent up without severing the judgments. If we had the right to do so, in this case, it would avail nothing; because the proceedings and judgment separately, would not constitute records on which we could act. Besides, there is nothing in the writs of error which enables us to say to which judgment they were designed, respectively, to apply; and were we to reject one of the writs, the plaintiff would not be benefitted. There would be still two judgments, which are not examinable on one writ of error. For these reasons, we are not permitted to examine the assignment of errors.

The writs of error are therefore dismissed.

JULY 1828.  


## MOORE, Executor v. DUDLEY and WIFE.

1. In construing wills, the intention of the testator must govern, and it is to be ascertained, when doubtful, from a full view of the entire instrument; all its parts are to be reconciled if possible, and if not, the latter provisions are to govern.
2. B bequeathed to his daughters, S. and A. each eight negroes, which they then possessed; and to his other daughters, each, a lot of negroes equal in value to those given to S. and A. to be allotted them when they respectively married or came of age. Held, that the valuation was to be according to age, number, comeliness, &c. of the negroes, and not to the fluctuating or casual money value, at the time the younger daughters should become entitled.

PULASKI DUDLEY, for himself and Susan, his wife, in right of his wife, filed a petition in the County Court of Madison county, in March, 1825, against William Moore, who was the executor of Uriah Bass, deceased, claiming a further allowance to the value of \$1,515, for a deficiency in a distribution of the negroes of said estate, made to him under the will of said Bass, and for the hire of the slaves he should have received as he alleged.

The controversy arose on the construction of the will, and on that part of it only, which related to the disposition of the negroes of the estate: it contained sundry devises and bequests, concerning which there was no difficulty.

The material facts appear to be these. Bass made his will in 1819, and shortly afterwards, died. By it, he bequeathed to his married daughters, Sarah Green and Ann Green, among other things, to each, a lot of eight negroes, which he said they had received from him. The will afterwards contains these words: "I give and bequeath unto my daughters, Elizabeth, Susan, Mary, Louisa, and Julia, each of them two quarter sections of land, to be purchased at the discretion of my executors, not to exceed eleven dollars per acre, on an average; also a lot of negroes to each of them, equal in value to the lots given to my daughters Sarah Green and Ann Green's lots, immediately after my death. It is my will and desire as my daughters marry or come of age, that their lots of negroes should be valued and laid off to them by my executors." Other small articles were bequeathed to each of these daughters. Provisions are also contained in the will for each of the testator's sons, Richard, William, and Uriah; and besides other things, it contains a bequest to each of them in these words: "also his proportionable part of the negroes not

JULY 1899.

Moore, Ex'r.  
v.  
Dudley and  
Wife.

---

already given away." It also directs that both sons and daughters should be well educated out of the surplus of the estate, and the residue, if any, to be equally divided between the sons. The will speaks of executors, but Moore alone was nominated.

At the death of the testator, Moore, the executor, proceeded to value the negroes of Sarah and Ann, and estimated each lot at about \$3,900, having reference to the market price or current value at that time. In February, 1824, Susan, one of the daughters, intermarried with Dudley, the petitioner. The negroes being hired out at that time, as soon as the time of hiring expired, in January following, the executor, with the assistance of two other persons, proceeded to set apart for the petitioners, a lot of eight negroes, corresponding in age, size, comeliness, and capacity, to the lots which had been assigned to each of the elder daughters. The petitioners objected to receiving this lot as full satisfaction, but took them as part, saying they were not worth as much as such negroes were at the time the other negroes were valued. They also on their part, caused the negroes received, to be valued by three persons chosen by them for the purpose, who valued them at the current price at the time when received, at \$2,435, leaving a deficit of \$1,515, less than the valuation of the former legacies.

Moore, the executor, was served with process, but did not answer; upon which the County Court, in November, 1825, after a full consideration of the matter, decreed that additional negroes should be set apart for the petitioners, to the value of \$1,515; that the executor should account to them for the hire he had received for those additional negroes, from February, 1824, till delivered to the petitioners, and that he pay the costs.

Moore, the executor, sued a writ of error to this Court, and assigns the following as grounds for reversal:

1. That the County Court had no jurisdiction of the matter.
2. The decree should have been in favor of the appellant.
3. That the decree is erroneous in not having required of the petitioner, a refunding bond.
4. That there was error in decreeing hire, without ascertaining the amount.

HOPKINS, for the plaintiff in error.

KELLY & HUTCHISON, CRAIGHEAD and THORNTON, for the defendants.

JULY 1899.

Moore, Ex'r.  
v.  
Dudley and  
Wife.

---

By JUDGE SAFFOLD. In my view of the subject, the second cause assigned will dispose of the whole case, and dispense with any examination of the other exceptions taken. Whether the judgment or decree of the Court should have been for the plaintiff or defendant, depends on the legitimate and equitable construction of the item of bequests, and the influence that the other parts of the will which have been noticed can have upon it.

The question is, did the testator intend that his unmarried daughters should each receive lots of negroes equal in permanent or intrinsic value, and in themselves every way comparable to the portions of their elder sisters? or did he intend that they should receive allotments, which at the subsequent and distinct periods at which they might severally marry, or attain full age, should be valued, according to the then true market price, at the same sum that the other lots were estimated at, nearly five years previously.

It is to be observed, that the defendant does not charge, nor did the County Court assume the position, that the negroes allotted to him and wife, were not of themselves in all respects equal to those composing the former lots, by which they were to be governed; but it is charged that during the intermediate time, there had been a great depreciation in the market value of such property, so that negroes of the same description would at the latter period command in market but little exceeding one half what they would have done at the former. By this rule, nearly twice the number of negroes, equal in quality and permanent value, would be necessary to satisfy this, than composed the former legacies, by which it is to be regulated. And as the five younger daughters must necessarily claim their several portions at different periods, covering probably a space of ten years or more, there might be from the same cause, equal disproportion, in the number and quality of negroes necessary to complete their respective lots.

The counsel for the defendant urges with some plausibility, as a reason why distribution should be made on the principles adopted by the Court below, that supposing each legatee to have sold the negroes, the elder, soon after the death of the testator, and the latter at the time his was allotted, they would have been equal in the amount of money. This is admitted; yet the reflection naturally occurs, that sales at these particular junctures were the only means by which they could have resulted equally, as the

JULY 1820.

Moore, Ex'r.  
v.  
Dudley and  
Wife.

---

price of negroes fluctuates with nearly the same rapidity as any other description of property, even the staple commodity of the country. Also, that the legacies were obviously intended to be in property, in preference to money; otherwise it is a reasonable conclusion that the negroes would have been directed to be sold by the executor, as the more usual and practicable mode of equalising the pecuniary legacies. Let us also suppose, instead of a depreciation in the price of negroes during the time mentioned, an equal advance had happened. In that casual event, in lieu of perhaps twelve negroes that the defendant now claims, he would only have been entitled, on the principles of his argument, to about five of the same quality or description. Then suppose at the time of this latter allotment, his negroes, and the lots of the elder sisters had been sold together, or at the same rates, how would the equality of the legacies have stood.

The idea of a contemplated sale of the negroes is further excluded, from the consideration that they are a kind of property easily transferable to whatever place desired. There is usually some attachment for negroes raised or long used in a family, and the sale of such property by legatees is often distressing to their relatives and friends, and indicative of embarrassment. And though circumstances may justify the sale, and it may be for a different cause, and with different effects, such cannot be presumed to have been the testator's intention.

It may also be safely assumed, the testator intended to make these legacies as equal as practicable, by division; for otherwise, and according to the rule contended for by the defendant, he left it altogether uncertain which should have the advantage. It would depend alone on the contingent state of the negro market when either daughter might marry, or attain full age. The consequence would be, that one might speculate handsomely on her brothers and sisters, by the temptation to favor a match at a time of extreme depression, as in 1824; while another, at a different period, might be compelled to postpone an acceptable offer, or yield her claim to four or five negroes, because the times should exhibit the delusive appearance of prosperity, as in 1819.

But speculative remarks aside, the principle is well settled, that in the construction of wills, the intention of the testator must govern, and that this is to be ascertained when doubtful, from a full view of the entire instrument;

JULY 1830.

Moore, Ex'r.

v.

Dudley and  
Wife.

that the whole must be reconciled, if possible, and if not, the preference is to be given to the latter provisions. Then, on the language of the bequest, that the testator gave to each of his five younger daughters, a lot of negroes *equal in value* to the lots given to his daughters Sarah and Ann; and that his executor should value the two lots immediately after his death; and as his other daughters should respectively marry or come of age, the same person should value and lay off to each of them their several lots, my interpretation of that item alone would be, that he intended each of his daughters should receive a lot of negroes of equal relative value, with reference to those essential qualities which render them useful and profitable. And that this is the only equitable and rational construction from the inherent nature of the subject.

It also appears to me that this construction is strongly corroborated by a subsequent part of the will; I allude to the provision which declares that each of the sons shall receive "his proportionable part of the negroes not already given away." It is certain the testator intended each of his sons as well as daughters should receive a portion of his negro property, and we cannot presume his stock to have been inexhaustible. The principle contended for by the defendant might disappoint this intention, by consuming the negro property in completing the legacies to the daughters, and I think it a rational and natural conclusion from the various provisions of the will, that the whole estate, after defraying the incidental expenses, was only sufficient to allow each of the eight younger children legacies of about the same value with those to the married daughters, when estimated with reference to the same standard of price. If then because of a subsequent, casual, and fluctuating change in the state of the market, some of the legacies are to be increased one third, or one half, in quality or quantity of property, the consequence must be that the sons, and perhaps one of the daughters, would be entirely excluded.

The lots of negroes to the sons may have been intended to be different from the allotments to the daughters; and this may have proceeded from a difference in their real estate, or in the expense of their education; or it may have been unavoidable from the impossibility of determining the precise value or condition of the estate. Had the several allotments been directed to be made in any commodity usually raised or prepared for market; or any article,

the value of which mainly depends on the facility with which it is converted into money, I think they would stand upon a different principle, and in such case the position contended for by the defendant would be sustainable. But such a bequest has been seldom made, for the reason that when money is the object, it is preferred that the executor be directed to make sale of the articles and distribute the proceeds.

In this opinion the court are not unanimous, but a majority concur. Let the judgment be reversed.

JULY 1829.

Moore, Ex'r.  
v.  
Dudley and  
Wife.

**CARRINGTON V. CALLER, and  
HOLDER V. MEGGISON and HILL.**

1. An agreement which is founded on a consideration which is against public policy, whether it be for the whole, or only for part, is void.
2. An association formed for the purpose of purchasing lands at the public sales of the lands of the United States, and re-selling them at a profit, by preventing competition, is unlawful, as contravening public policy.
3. A bond given to such an association for land sold by them, is void; their articles of agreement having unlawfully stipulated for the purchase and sale of said lands by them.
4. On a demurrer to evidence, the Court must take as true against the party demurring, all facts, and all inferences, which a jury could legitimately draw from those facts. Yet the same rules of evidence govern as in other cases, as to the inferences of witnesses.

Stewart.  
2d 175  
117 870

THESE were actions of debt, brought in the year 1822, in the Circuit Court of Monroe county, by the plaintiff in error against the defendants, who were also defendants in the Court below, to recover on two specialties, made by the defendants respectively, on the 29th of April 1819. In the case of Carrington, the instrument was made by James Caller and Robert Caller, and payable to A. B. Carrington or bearer. In the case of Holder, the note was made by W. Meggison and W. Hill, payable to E. Parsons, and assigned by him to the plaintiff J. Holder. The Causes were not precisely similar, but as they involved the same principles, and grew out of the same transaction, they were tried together. There were in the Courts below, many actions pending on similar notes; there were also a great number of notes of the same de-



JULY 1829.

Carrington  
v.  
Callier

scription in the hands of different individuals, amounting to a very great sum of money, and it was understood that the right to a recovery was to depend on the decision of those causes: For which reason, they were, after several protracted and elaborate arguments of the most able character, decided by the court upon great deliberation.

The pleas of the defendants embraced the defences, 1st, that the notes were delivered without the name of any payee being inserted, and that the payees name had been inserted without the authority, knowledge or consent of the defendants. 2d, That they were fraudulently obtained; and 3d, that the consideration on which they were founded, was illegal as being contrary to public policy. The defendants introduced much testimony to sustain their pleas, which is too voluminous to be here inserted, but the substance of which appears in the opinions delivered by the judges, together with their views of it. To this evidence the plaintiffs demurred in law, and the plaintiffs joined in demurrer; and by consent, judgments *pro forma* were rendered on the demurrers in the Court below, for the defendants, in order to bring the causes before the Court without prejudice to either party. The error assigned is, that on the demurrers to the evidence, the judgment should have been for the plaintiffs.

HITCHCOCK and GORDON, for the appellants.

BAGBY, THORINGTON, ELLIOTT & KELLY, for the appellees.

By JUDGE TAYLOR. \* It is to revise the judgment rendered by the Court on the demurrer of the plaintiffs to the defendants' evidence, that this cause is brought to this Court.

The action was brought upon an instrument, of which the following is a copy, viz:

"On or before the 28th day of April 1822, we or either of us promise to pay A. B. Carrington or bearer, one hundred and fifty dollars (with interest from the date if not punctually paid) for value received. Witness our hands and seals, this 29th day of April 1819.

(Signed,) JAMES CALLER, [SEAL.]  
ROBERT CALLER. [SEAL.]"

\* NOTE.—This opinion appears to relate solely to the case of Carrington v. Callier, although both cases were disposed of by the principles settled by it. By referring to the opinions delivered by Judges White and Collier, the facts constituting the distinction between the two cases will be seen.

JULY 1820.

Carrington  
v.  
Callor.

---

It is proved that a public sale of lands by the United States, was advertised to take place at St Stephens. That in anticipation of the sale, and shortly before it was made, several persons associated themselves together for the purpose of preventing competition at this sale, and thereby obtaining the lands at the minimum price. That this association or company entered into a written agreement which was to the following effect: "That no individual should have more than one share, and that none but a land buyer should be permitted to join the company. That each person on joining the company should pay one thousand dollars. That he should not bid at the government sales. The lands were to be bought by persons named by the committee," (this committee consisting of persons selected by the company at the time of its organization, to whom its interests were confided,) "and afterwards resold at public sale, where all persons were to be permitted to bid; and the difference between the company and government sales was to constitute a fund which was to be equally divided among the members of the company."

There is also much evidence tending to prove violations of these terms by the committee. That to secure a large harvest to themselves, they inserted many names of persons who were not members, as such, several of which were fictitious; and other acts were done by them in contravention of the agreement, which it is unnecessary to state, as they form none of the data on which the court has arrived at a decision.

It is proved that the members of the company, especially those who constituted the committee, were active in ascertaining the names, and particularly the pecuniary means of all strangers who arrived in town with the intention of purchasing land, and in urging every monied man, both stranger and acquaintance, to unite with them, promising an ample return of profit in the event of his doing so, and threatening to use the power which their united capital gave them, to make him give exorbitant prices for the lands he might purchase, or to prevent him from purchasing any, if he would not make common cause with them. It is also proved that persons who were unable to raise the sum of money necessary to constitute them members of the company were operated upon in another way to induce them to aid in effecting the objects of the company, viz: preventing competition at the government sales and adding to the amount of the joint capital. Such per-

JULY 1839.

Carrington

v.  
Caller.

sons it is true were not received as members of the company, but as they generally consisted of settlers on the lands which were to be sold, and their single object was to purchase the places on which they resided, offers were made to them by members of the company, that if they would not bid, the company would buy the land they wanted, and let them have it at a stipulated advance, generally double the government minimum price. In this way Nicholson, one of the witnesses, purchased one quarter section, and from the evidence, the inference is irresistible that many others did the same. These persons too were threatened, that if they should bid against the company, they should be either prevented from purchasing at all, or compelled to give ruinous prices; which threats the obstinate, in the few instances in which any had the temerity to continue so, found in the end, were literally executed. Witness the same Nicholson, who, before he would agree to the terms prescribed by the company, had been run up on four quarter sections which he purchased to \$15, \$10, \$9, and \$10, per acre. In this way, it appears from the testimony, the company succeeded in putting down opposition to their schemes, and purchased a large quantity of land, all at the minimum price of two dollars per acre, with the exception of a few quarter sections, which it is evident fell on their hands by their intention to run the settlers to the highest point, but who gave way sooner than was expected.

After the purchases were thus made, the company in conformity with their agreement, proceeded to sell at public sale the land thus purchased, on the following terms, viz: one fourth cash, the balance to be secured by notes with security, payable in four annual instalments. At this sale it appears to have been the object of many members of the company to run the land up to high prices, and as much as they could, to avoid purchasing themselves. When the sale was closed, the money and notes of the purchasers were received according to the terms, the payees' names being left blank in the latter, with the understanding that the blanks should be filled up to the person to whom they should be allotted in the distribution which was agreed to be made of them among the members of the company. The instrument sued on was one thus given and distributed, the defendant having been a purchaser at the company sale, and in the distribution, this instrument was allotted to the plaintiff, he being one of the company, and was

JULY 1829.

Carrington  
v.  
Caller.

filled up by him according to the understanding. The defendant was also one of the company though not one of the committee. This, I believe, contains a statement of all the evidence material to a correct decision of the legality or illegality of the contract, and the consequent right of the plaintiff to recover.

It was on a demurrer to the defendant's evidence, that a judgment *pro forma* was rendered for the defendant. It may be well, first, to understand what is the effect of a demurrer to evidence.

This mode of wresting the decision of facts from a jury, and devolving it upon the Court, has never been favored; but a party certainly has the power to do it. When, however, it is done, the evidence is to be taken most strongly against the party demurring, and the Court is to receive as true, not only every fact which is plainly proved, but also every inference which can legitimately be drawn from the facts, against the party demurring. And the reason of the rule is this, that a party shall never be injured by an act of his adversary done without his consent; and as it is the act of his adversary to withdraw the issue from the jury, therefore, every inference the jury could have properly drawn in his favor, shall be drawn by the Court. Yet, while these positions are such as the law assumes, it is evident that the evidence is to be governed by the same rules as in other cases, and that the inferences and deductions of witnesses, with which this record is pregnant, can have no effect upon the decision of the Court.

The defendant resists a recovery on several grounds. I shall only examine one of them, which is this: "that no judgment can be rendered for the plaintiff, because the consideration for which the instrument on which the action is founded, was against public policy, therefore illegal and void."

It is a plain and undeniable principle of law, that if the consideration, or any part of the agreement, upon which the bond which is the foundation of this action, was executed, was illegal or against public policy, the bond is void, and there can be no recovery thereon. This position has been taken by the defendant's counsel, was not denied in the argument, nor can it be controverted. \*

The inquiry then is, was the consideration for which this bond was executed, against public policy and illegal?

But before this part of the subject is directly investigated, it is necessary to determine upon the character of the agreement entered into by the company, as respects the

\* Powell on contracts 176.  
1 Comyn on contracts 30.  
Wheat. 258.

JULY 1820.

Carrington  
v.  
Caller.

interests of the United States; and whether that agreement, so far as it was intended to affect the sale of its lands by the Federal Government, was against public policy, and consequently illegal.

A combination between two or more persons by which it is agreed, that one or more shall not bid at an auction sale, and the other shall make the purchases for the benefit of all the parties, has uniformly been decided to be a contract against public policy, and that no recovery can be had against the bidder if he refuse to carry the agreement into execution, but he may retain all the profits of the speculation in his own hands. See 6th Johnson's Reports 194, 8th Johnson's Reports 346, and 13th Johnson's Reports 112. The case last cited is very strong. Judge Spencer, who delivered the opinion of the Court, first determines that the contract was not *nudum pactum*, but, except for its illegality, sufficient to sustain the action; but he proceeds to say: "Whatever may have been the motives of the parties in making the agreement, and however upright their intentions, the question recurs, is not the promise made by the defendant, void, as contravening established principles of public policy? If the consideration be ever so meritorious, yet if the act agreed to be done, and which forms the basis of the agreement, be unlawful, the promise cannot be enforced in a Court of law." He proceeds: "The judges who delivered opinions in the case of *Jones v. Cawell*, held, that the law had regulated sales on executions with a jealous care, and had provided a course of proceeding likely to promote a fair competition, and that a combination to prevent competition, was contrary to public policy and to the interests of the original debtor, whose property was liable to be sacrificed by such combinations. The principle was recognized in *Doolin v. Ward*,<sup>a</sup> and in *Willin v. How*.<sup>b</sup> These were cases of sales at auction; but the principle applies with equal, nay more force to sales on executions." He continues: "It has been urged that the plaintiff was not bound to bid on the second execution, and was, therefore, at liberty to enter into this agreement. This is not the test of the principle. In none of the cases cited was the party bound to bid; but being at liberty to bid, he suffered himself to be bought off, in a way which might prevent a fair competition. The abstaining from bidding, upon concert and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress."

<sup>a</sup> 6 John. 154.<sup>b</sup> 8 John. 346.

JULY 1829.

Carrington  
v.  
Caller.

---

It appears then that the case of *Thompson v. Davies*, in which the opinion of judge Spencer, from which the above extract is taken, was delivered, did not turn upon its being a sale under execution, relative to which the agreement was made, which was declared void, but that it is equally illegal to combine for the purpose of putting down competition at any auction sale, because such combinations tend to cause a sacrifice of the property thus sold.

It is unnecessary to enter into a labored train of reasoning to support this decision; its propriety is too apparent. But were it of a more doubtful character, the decisions are too uniform, and the principle too well settled, now to be disturbed. <sup>a</sup>

<sup>a</sup> See Cowper  
25, 6 Term  
Rep. 642.

It is now necessary to inquire, does this rule apply to a sale of lands at auction by the United States? It is urged that the government is interested in fostering the interests of its citizens and securing their prosperity; that it is not consistent with these objects nor good policy, that it should sell its domain at high prices to the citizen; and that establishing a minimum price, proves that nothing more is expected or demanded by the government; therefore any combination intended to secure the lands to the purchasers at the minimum price, is perfectly consistent with the policy of the government, and of consequence lawful.

It might if necessary be replied in this instance, that the facts of the case do not show a disposition, on the part of the ruling spirits of this company, to secure to the citizens at large, the purchase of the government lands at the minimum price, and thus to promote the prosperity of the country, by securing the comfort and pecuniary independence of the citizen: on the contrary, the manifest object of the company was to swell their own coffers by unjust exactions from others. Else why by threats and promises deter the humble settler from securing the place on which his cabin and his family were situated, at the government sale? Why require that he should not bid, but that the land should be all purchased, which was of any value, by this monopolizing company? Why exact from him a large advance, generally one hundred per cent at least, for the privilege of paying the amount demanded by the government, for the land which he wanted to live upon and to cultivate? Whatever may have been the intentions of the government, these facts afford but little proof that this company wished to advance the prosperity of the citizens generally, by enabling them to obtain lands at the minimum price.

JULY 1829.

Carrington  
v.  
Caller.

---

But in judging of the policy of the country, we are not to be governed by opinion and speculation. when there is plain law to guide us. The acts of Congress evince that it is not the intention of the government to invest its citizens with titles to the public lands at the lowest specified price, but that the lowest price is specified to secure, so far as is practicable at a public sale, the real value of the land.

Nothing is more common than for a person who offers his property for sale at auction, to make it known to bidders that a price is fixed on, below which it will not be permitted to be sold. Yet who has ever understood that this was proof that the owner wished no higher price to be bid? Surely it gives conclusive evidence to the contrary; nor has it ever been supposed that a combination to prevent competition, where there was such limitation of price would be less illegal, than in other cases.

If it had been the policy of the United States to dispose of their lands at two dollars per acre, and no more, it would have been easy for Congress to have made this intention obvious, nay it would have been easy to have effected the object. It would only have been necessary to have permitted entries to have been made at this price, and complete effect would, at once, have been given to such intention. On the contrary, efforts which have been made to obtain the passage of such a law, and there have been many, have proved unavailing. It is evident to me that the object of the government, as declared by its laws, has been to sell the public lands for the highest price they would bring, and the minimum price has been established with a view directly in opposition to the one contended for by the counsel for the defendant in error.

The inquiry results then, was this company formed for the purpose of putting down competition at the sale of the public lands at St Stephens?

To show that it was, more perfectly than the evidence proves it, would be impossible. It was the avowed object for which the members composing it associated themselves together; it is expressed in the agreement which bound them together, and it is not only apparent that this was their intention, but equally clear that they were altogether successful. The lands were equally valuable at the time they were sold by the government, as when sold by the company. Only two or three days intervened between these sales; no additional value was given to the lands by

JULY 1850.

Carrington  
v.  
Callier.

improvements put upon them by the company, yet at the last sale, it is evident, they must have been bid off at an advance, probably of several hundred per cent. The witness, Darrington, received in cash at the close of the sale, by division of the spoils of the company, one hundred and twenty-five per cent. profit, on the amount placed by him in the hands of the committee; and how much more his part of the dividend in the notes came to, we are not informed; but as only one fourth of the sum bid was paid in cash, it is no difficult matter to arrive at a conclusion. The company then did combine to put down competition at the sale of the government lands, and the agreement by which such combination was formed was against public policy, consequently illegal and void.

But although this was the case, yet unless such illegal agreement embraced the sale by the company, unless it formed a part of the contract by which the defendant became a purchaser at the company sale, and in consideration of which purchase he executed the bond sued on, it is no defence to him, and judgment must be rendered for the plaintiff in error. I will now endeavor to investigate this part of the case.

The law which governs this point is so lucidly laid down, and the decisions relating to it are so generally referred to in the case of *Armstrong v. Toler*,\* that it is only necessary to refer to that case for information. In that case the judgment of the Circuit Court, in favor of the plaintiff, was affirmed: but there, it was determined that the contract sued on had no connexion whatever with the illegal one upon which the defendant rested his defence.

a 11 Wheat.  
258.

The case was as follows: an action of assumpsit was brought by Toler to recover from Armstrong a sum of money paid by Toler on account of goods, the property of Armstrong and others, consigned to Toler, which had been seized and libelled in the District Court of Maine, in the year 1814, as having been imported contrary to law. The goods were shipped during the late war with Great Britain, at St Johns, in the province of New-Brunswick, for Armstrong, and other citizens and residents of the United States, and consigned to Toler, also a domiciled citizen of the United States. The goods were delivered to the agent of the claimants, on stipulation to abide the event of the suit, Toler becoming liable for the appraised value; and Armstrong's part of them was afterwards de-



JULY 1829.

Carrington  
v.  
Caller.

a page 271.

b page 261.

livered to him, on his promise to pay Toler his proportion of any sum for which Toler might be liable should the goods be condemned. The goods having been condemned, Toler paid their appraised value, and brought this action to recover from Armstrong his proportion of the amount. The charge of the judge of the Circuit Court is given at length in the statement of the case, and not only the result of that charge, but the reasoning by which it is sustained, is dwelt upon considerably by Chief Justice Marshall, who delivered the opinion of the Supreme Court. We have the point discussed by the Circuit Court, and which was revised in the Supreme Court, in the following words of the Chief Justice: <sup>a</sup> "The point decided" (below) "is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler when the contract was made, provided he was not interested in the goods, and had no previous concern in the importation." The presiding judge in the Circuit Court, in charging the jury, thus expresses himself: <sup>b</sup> "I understand the rule, as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a Court of justice will not lend its aid to enforce it, and if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. As if the importation was the result of a scheme to consign the goods to the friend of the owner, with the privity of the former, that he might protect and defend them for the owner in case they should be brought into jeopardy. I should consider a bond or promise afterwards given by the owner to his friend, to indemnify him for his advances on account of any proceedings against the property or otherwise, to constitute a part of the *res gesta*, or of the original transaction, though it purports to be a new contract."

The position taken by the Circuit Court, in this supposed case, is expressly sustained in the opinion of the Supreme Court. Let us test the case before us by it. The obvious meaning of the judge is, that should an illegal agreement contain a stipulation, that something, upon the happening of a contingency, should be done by one of the parties, which if done without such stipulation in the illegal agreement, would form a second and independent contract, its being so stipulated in the illegal agree-

ment, would cause it to be tainted by the original consideration, and it would be void.

JULY 1839.

Carrington  
v.  
Callart.

---

In the case put, goods are shipped contrary to law, it is agreed that the consignee shall, when necessary, and if libelled, defend them, and that the consignor will indemnify him for the expenses which may be incurred in doing so. The goods are libelled, the consignee does defend them and pay the expenses consequent on the suit, the consignor executes to him his bond or note for the amount of the expenses thus incurred and paid; this instrument is tainted with the illegality of the importation, and is void. Why is it so tainted? Because it was contemplated by the parties, and provided for in the first agreement. If the goods had been shipped with the simple understanding that the consignee should receive and sell them, and he had paid expenses consequent upon their being libelled, without any previous engagement to do so, and the owner or importer had subsequently promised to pay those expenses, there is no doubt but the execution of this promise might have been coerced at law, although the consignee knew of the illegality of the importation. This, in fact, would have been substantially the case then on trial. And the reason is, that it is lawful for a man to defend a suit of this description, therefore it must be lawful for him to borrow the money to enable him to do so, even of one having a knowledge of the illegality of the original transaction. Thus it appears that an agreement which is entirely innocent in itself, may be rendered illegal and void simply from its being included with one which is against public policy, which is so contaminating, that it taints every thing with which it comes in contact.

To apply this to the case before us. The members of the Court all concur in the opinion that the combination to prevent competition in the sale by the United States was illegal, and therefore not binding on those who entered into it. Indeed, this point was so manifestly against the plaintiff, that his learned counsel seemed, in the argument, almost to yield it. But the same agreement by which this combination was formed, contained a stipulation that the land purchased by the company should be immediately resold at auction; it was so resold, and the defendant, as one of the purchasers, made the promise of payment which is the foundation of this action; and it is insisted that this is an independent contract. How independent? Was not the land sold by the express terms contain-

JULY 1829.

Carrington  
v.  
Callier.

---

ed in the illegal agreement? To this question, there can be but one answer; it was. If it was illegally purchased, must it not have been illegally sold? To my apprehension it would seem so. A system of operations was fixed upon by this company, of acquisition and disposing of property in the lump; the mode of acquisition is illegal, which is apparent upon the face of their articles of association; these same articles prescribe the terms on which the disposition is to be made; the disposition is to be made according to those terms, and yet it is insisted this is a contract totally independent of the first. To my mind this is strange logic. It is said that it is perfectly lawful either for a company or an individual to sell lands which they own; so it is perfectly lawful for A to lend B money to defend a lawsuit in the general, yet we have seen above that there may be cases in which it is unlawful. But it is urged, that notwithstanding the land was illegally acquired, still the holder may lawfully sell it, and the purchaser will be bound to pay him the purchase money, unless the original vendor sets up his title. I do not dispute this, unless the mode of sale was stipulated in the illegal agreement by which it was acquired. So where goods illegally imported are libelled, it is legal for a person who has advanced money at the instance of the defendant, to defend the suit, to sue him and recover the amount. But if the person who makes the advance does it by virtue of an agreement made with the importer concerning the unlawful importation, he cannot effect such recovery. Suppose this had been an agreement, that a company, of which the defendant was one, should acquire title to lands in a manner prohibited by law, and that the company should convey them to the defendant for a specified advance, and, to make the case more applicable, I will suppose the lands are not designated in the agreement, except that they are to be of a particular value. Would not this agreement be tainted throughout? and if such purchase by the company and conveyance to the defendant were to take place, could any recovery be had by the company on a bond given to them as the consideration? Clearly not; but he would hold the land against the company, discharged of such bond. Can then the circumstance of a public sale being stipulated, when one of the company purchases at that sale, vary the nature of that instrument so far as to render it binding and obligatory? To me this seems impossible. The sale by the company of the whole of this purchase at

JULY 1839.

Carrington  
v.  
Caller.

one and the same time, is expressly provided for by the illegal agreement to purchase of the United States. The whole of that agreement, and every contract growing directly out of it, is void, as well that part of it which prescribes the mode of sale of the lands to be purchased, as the rest. But the sale of the company, at which the defendant became a purchaser, and in consideration of which purchase he executed the instrument sued on, was expressly provided for in the original unlawful agreement; therefore, the execution of the note of the defendant grew immediately out of the original agreement, and it is void; and this becomes the more clear, when it is remembered that the defendant himself was a member of the company, and a party to the whole transaction. In the language of the Court in the case of *Armstrong v. Toler*, "the contract is in part connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract." Indeed it can scarcely be termed a new contract, so intimately is it interwoven with the stipulations contained in the agreement entered into by the company for the purchase of the public lands. Had the purchases been effected, and no sales made, the agreement would not have been fulfilled; and as it was necessary for the company to sell before their agreement was executed, it was certainly as necessary for some persons to purchase; therefore the purchase by the defendant, and the execution of the instrument sued on, grew immediately out of the illegal agreement.

Chief Justice Marshall, in his very able opinion before referred to, cites several cases from English books, in all which the turning point was, "is the contract entirely a new one, distinct from, and unconnected with the illegal transaction, or had it any relation to it?"

If in the case of illegal contracts, money was advanced by one of the parties, even in an incidental way, for another, he could not sustain an action to recover it back. As in the leading case of *Faikey v. Reynous*;<sup>a</sup> the plaintiff and one Richardson were jointly concerned in certain contracts prohibited by law, on which a loss was sustained, the whole of which was paid by the plaintiffs; and a bond was given by Richardson to secure the repayment of his proportion of the loss. On this bond there was a recovery, Lord Mansfield presiding, on the general ground, that if one person apply to another to pay his debt, whether contracted on the score of usury or for any other pur-

<sup>a</sup> 4 Burrow  
2089.

JULY 1829.

Carrington  
v.  
Callor.

a Page 410.

pose, he is entitled to recover it back again. In 6 Term Reports <sup>a</sup> Ashurst, Justice, says: "The defendants are held liable because they have voluntarily given another security." But in the case of *Faikey v. Raynolds*, the defendant would not have been liable had he not executed his bond voluntarily after the money was advanced. The payment of the money by the plaintiff would not have authorized the recovery, with the subsequent and independent obligation of the defendant; and if the original agreement had contemplated the payment of the money by the plaintiff, the bond subsequently executed, we are bound to believe from the report of that case, would not have validated the transaction.

b 3 Term Rep.  
418.

In the case of *Petrie* and another, *Executors of Keeble v. Hannay*, <sup>b</sup> this distinction between a voluntary payment, and one made on the request of the party, was taken; and it was expressly held that where money was paid by one person for another, on an illegal transaction, *without an express assumpsit*, no action could be maintained.

In none of the cases which I have cited, does it appear that the plaintiff's recovery was made to depend on his having to give evidence of the illegal consideration, or not, before he could lay a ground for a verdict. Indeed, although this rule is laid down in some cases in the books, it cannot be general in its application, as the mere introduction of a bond or promissory note would preclude all further inquiry, and render certain a recovery, no matter how nefarious the consideration. According to this rule, in the case put by the judge of the Circuit Court in *Armstrong v. Toler*, and which I have already considered at some length, if a verbal promise were made to repay the expenses of the suit which had been paid by the consignee, who had agreed when the goods were shipped to him, to make such payment if necessary, the plaintiff on the trial, would prove the suit, the payment of the expenses, and the promise, this would authorize a verdict in his favor; but the judge of the Circuit Court says, (and the Supreme Court sustains him,) the defendant might then prove the original illegal agreement, and that the promise and payment were made in conformity with a stipulation contained therein, and thereby exonerate himself from the demand. It is against every principle of law to determine that a plaintiff, by management, may, without the act of the defendant, place himself in a better situation, and the defendant in a worse, than they otherwise would be.

JULY 1890.

Carrington  
v.  
Callor.

---

Certainly if a defendant would be authorized to introduce evidence to prove that a bond or promissory note had been given for an illegal consideration, he would be equally permitted to prove that although executed upon a new consideration, yet that it grew immediately out of an illegal one. It is urged, however, that to determine that the sale to the defendant is illegal and void, is tantamount to deciding that by the purchase, the title to the lands is so irrevocably fixed in the company that they can never sell them. In the present case there is no difficulty on this part of the subject. The company were competent to part from their title, and have done so; the ownership of the land was vested in the purchaser, and this agreement stands precisely as any other of the same kind, to all which the maxim applies, *in pari delicto melior est conditio possidentis*. It will be remembered that this agreement provided for the resale immediately at auction, of all the lands to be purchased; by this provision the two sales are so engrafted into each other, that it is impossible to separate them. If the sales had been made of different tracts of the land purchased by the company at different times, there would not have been so close a connexion between the transactions, and the impolicy might have been on the other side.

It has been contended for the plaintiffs that if the United States do not agitate this question, and sue for a rescission of the sale made to this company, no other person can move a step that way. It is certain that no party to this illegal agreement could successfully apply to the tribunals of the country, as plaintiff, to be relieved from the situation in which he has placed himself; but it is equally certain that any person sued on any part of it may plead its illegality in his defence against any other person whatever. All the cases referred to are those in which similar defences have been urged, and the only inquiry has been, "was the plea sustained?" not, "was it legal to make it." Who is it that has uniformly sued on agreements to prevent competition at auction sales, in the cases in which those agreements have been determined to be illegal? Not the owner of the goods sold, but a party to the agreement who conceived himself injured by not receiving from his fellow, his share of the profits made by the speculation. Such contracts are void as to all the parties concerned, and destroy every agreement which is affected by their polluting touch.

JULY 1829.

Carrington  
v.  
Callier.

---

One ground occupied by the plaintiff remains to be examined; it is this, that unless the defendant places the plaintiff, (or the company from whom he purchased,) in as good a situation as he found him, judgment must be given for the plaintiff; and this it is said, he cannot do, because it is proved he has sold the land.

The maxim *in pari delicto melior est conditio possidentis*, might afford a sufficient answer to this objection; but waving this, it may be replied, that if this rule applies, it certainly relates to the time at which the whole transaction commenced. At that time what was the situation of the company? They were in the possession of the money placed in the hands of the committee, their agents, by the individuals who composed it, amounting to a thousand dollars each. When the land was purchased by them, they paid down one fourth of the purchase money, and received the registers certificates. When they sold to the defendant (at a greatly advanced price,) he paid them one fourth the amount or price for which he purchased of them, received a transfer of the register's certificate, and was alone responsible to the United States for the remainder due to them. The company then, collectively, and members individually, particularly those who bought no land at their sale, have profited greatly by their illegal association; and have received for the land purchased of them by the defendant, in part payment for which the instrument sued on, was given, much more than they have paid. As is shown by the testimony, they received in cash an advance of an hundred and twenty-five per cent. on their capital, with a return of the principal, within two or three days of the time of its investment. Surely then they cannot complain, nor this plaintiff, who was one of them, that the defendant does not place them in *statu quo*.

For these reasons, I am of opinion that the judgment should be affirmed; and of this opinion are a majority of the Court.

By JUDGE COLLIER. I have not enjoyed the instructive pleasure of hearing the arguments made in the cases at previous terms, and consequently, am denied the benefit of the lights they doubtless shed on the points of inquiry; I must therefore content myself with expressing an opinion, assisted by such aids as the arguments at the present term, and reflection upon them afford.

JULY 1829.

Carrington  
v.  
Caller.

---

The facts admitted by the demurrer to the evidence, so far as material to be noticed, may be thus condensed: At a sale of the government lands in the St Stephens land-district, in April 1819, a company was formed for the purpose of purchasing them. That the stipulations in the articles of their association were, that no individual should have more than one share, for which he should contribute to the funds of the company one thousand dollars; that none others than those wishing to purchase lands should be permitted to become shareholders; that the members of the company should not bid against each other at the government sale; that the company should appoint a committee from among its members to manage its operations; that the committee should name the persons to bid off the land, and that the lands purchased by them were to be resold at public auction in a very short time thereafter, at which sale all persons were permitted to bid; and the difference between the sum paid to the government, and that at which the lands might be bid off at the company sales, was to constitute the profits, and be equally divided between the members of the company; and that the terms of the company sale was one fourth in cash, the three remaining fourths in four years, for which bonds were to be given. It is further admitted that the members of the company persuaded those who wished to purchase public lands to join them, and some of them, where persuasion proved unavailing, employed threats to effect their purpose; that at the government sales but little resistance was made to the company bidders, and they purchased much the larger portion of the lands sold, at about one fourth of the sum they sold for at the company sales; that the auctioneer employed by the government to vend the lands, was a member of the company, and one of the committee to manage its operations; that the defendant, Caller, was one of the company, and that the bond on which the action of the plaintiff is founded, was given for land purchased at the company sales; that there were deposited or pretended to be deposited by the committee on account of real and fictitious persons, in violation of the stipulations of the articles of association, money to more than twice the amount of the shares actually taken, that their dividend might be increased; and that the bonds taken by the company were distributed in equal proportions to the shares represented by the Committee.



JULY 1830.

Carrington  
v.  
Callier.

In the case of *Holder v. Meggison*, the foregoing facts, to the extent to which they are applicable, are admitted, and the following in addition: that the defendant Meggison, before the lands he wished to purchase were offered at the government sales, agreed with May, a member of the company, that if the company would purchase for him two quarter sections of land which were designated, that he would pay the company two dollars advance per acre upon the government sale. The company purchased the two quarter sections, refused to acknowledge May's authority to make the agreement, but, as to one quarter, confirmed it, and the defendant became the purchaser at their sale of the other quarter, at eleven dollars per acre; and the bond, on which the plaintiff's action is brought, is for part of the eleven dollar purchase and part of the two dollars advance, the residue of the money agreed to be paid to the company being secured by other bonds. The question is, do these facts constitute an available defence for the defendant? Of this question I shall maintain the affirmative.

The government of the United States have, by Congress, its legitimate organ, provided the manner in which its domain shall be disposed of. They have fixed a value at less than which it shall not be sold; and have directed that it shall be offered at public auction, where it may sell at this minimum, and such an advance as those wishing to purchase may be inclined to pay. I understand by the adoption of the auction system, that the government designed its lands should sell if not for an ideal, at least for an intrinsic value. And that this was not ascertained by the minimum, but that the minimum was settled with a regard rather to the expenditures necessary to acquire the lands, and survey them for market, than any other consideration. And hence the object of government was not effected by a sale of its territory at a sum less than that which, in a fair market, it would yield. Consequently every association, the tendency of whose purposes is to cause the public domain to sell at a diminished value, thwarts, in this particular, the national policy.

Having noticed the policy of the government on this subject, so far as necessary, I proceed to consider such legal rules as the facts suggest. Every contract against public policy, or adverse to the enactments of the legislature, is illegal and void. <sup>a</sup> The principle of this rule is, that no one ought to be heard in a Court of Justice, who

<sup>a</sup> *Wheeler v. Russell*, 17 Mass. 256.

JULY 1830.

Carrington  
v.  
Callor.

seeks to enforce a demand arising out of moral and political turpitude; and it is well sustained by reason and good sense. The tribunals of justice are instituted, among other purposes, with a view to protect the policy of the country; by administering the laws, when they can be directly administered, or by refusing to coerce a compliance with engagements which are not directly inhibited, but which prevent the law from effecting the end it purposes. If only contracts which are directly prohibited were illegal, it would require but little exercise of the imagination, to devise means to evade the law, and the most salutary enactments might be rendered valueless and inefficient. As in every case of a contract against the policy of the country, both parties are *in delicto*, the Courts will not lend a favorable ear to either, but leaves them where it finds them, to adjust their differences without legal assistance. This rule is so well ascertained, that I should close this opinion by an application of it to the facts, did I not consider it due to the expectation and excitement produced by these cases, and other cases of a larger amount and of a similar character, that the authorities by which I sustain myself, should be noticed.

The case of *Armstrong v. Toler*,\* which was mainly relied on by the plaintiffs, I consider a very strong authority for the defendants. That was a case of an illegal importation of goods by Armstrong and others, resident citizens of the United States, during the late war with Great-Britain. The goods were shipped at St Johns, New Brunswick, and consigned to Toler, also a resident citizen of the United States. They were seized and libelled. The goods were delivered to the agent of the claimants on a stipulation to abide the event of the suit, Toler becoming liable for their appraised value; and a part of the goods were delivered to Armstrong, on his promise to pay Toler his proportion of any sum for which Toler might be liable, should the goods be condemned. Toler paid their appraised value, and brought his action to recover from Armstrong his proportion of the amount. The Charge delivered by the judge in the Court below was excepted to, and assigned for error. In his charge, the learned judge speaks thus: "I understand the rule, as now clearly settled, to be, that when the contract grows immediately out of, and is connected with an illegal or immoral act, a Court of justice will not lend its aid to enforce it; and if the contract be, in part only, connected

2 Wheaton  
252.

JULY 1859.

Carrington  
v.  
Caller.a 6 Term Rep.  
61.

b 8 John. 346.

c 8 Term Rep.  
575.d 2 Caines  
Rep. 147.

e 5 John. 327.

with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it." In illustration, he supposes this case: "If the importation was the result of a scheme to consign the goods to the friend of the owner, with the privity of the former, that he might protect and defend them for the owner, in case they should be brought into jeopardy; I should consider a bond or promise, afterwards given by the owner to his friend, to indemnify him for any advances on account of any proceeding against the property or otherwise, to constitute a part of the *res gesta*, or of the original transaction, though it purports to be a new contract. For it would clearly be a promise growing immediately out of, and connected with the illegal transaction. It would in fact be all one transaction, and the party to whom the promise was made, would, by such contrivance, contribute in effect to the success of the illegal measure." The principles maintained by the charge are elaborately considered and fully sanctioned and sustained by the opinion pronounced by the Supreme Court. In *Steers v. Lashley*,<sup>a</sup> the broker, who had been concerned in stock-jobbing transactions, paid the losses, drew a bill on the defendant for the amount, and after its acceptance, indorsed it to a person who knew of the illegal transaction. The Court held that the indorsee, having notice of the cause of drawing the bill, stood in the same situation with the drawer, and as the drawer could not recover the sum for which it was drawn, so neither could the indorsee. In *Wilbur v. How*,<sup>b</sup> a contract for making a certain road was set up at auction, and it was agreed between the plaintiff and defendant, that if either party should bid it off, it should be divided between them: Wilbur bid it off, and refused to give How a share in it according to his agreement; for the breach of which, How claimed damages. The Court refused to enforce the contract, because it was a fraud on the vendor. In *Howson v. Hancock*,<sup>c</sup> the Court of King's bench say, that no case can be found of an action having been maintained to recover back money paid on an illegal contract, both parties being *particeps criminis*. In *Belding v. Pitkin*,<sup>d</sup> the Court refused to entertain an action on a contract to pay over half the proceeds of an illegal contract, though the money arising from it had been received by the defendant. In *Hunt v. Knickerbocker*,<sup>e</sup> the plaintiffs were managers of a lottery in the State of Connecticut, and delivered to the defendant

tickets to sell in New-York. The defendant failing to return the unsold tickets according to his contract, the plaintiffs brought an action to recover their value. The Court held that the action was not maintainable, because the contract went to defeat the intent of the act of the Legislature of that State against private lotteries. And Mr Justice Thompson, who delivered the opinion of the Court, recognizes the general principle, that a Court of justice ought not in any manner to assist an illegal transaction. In *Waymell v. Reed*,<sup>a</sup> the sellers in France, by the order of the buyer, packed the goods up in a particular manner, with a knowledge that they were to be smuggled, and was not allowed to recover the price of them of the buyer in England. . In *Maybin v. Coulon*,<sup>b</sup> the action was brought to recover balances claimed of the defendant, on certain transactions, which it appeared were opposed to the policy of the navigation system. Chief Justice Shippen, in expressing the opinion of the Court, uses this emphatic language: "The act of the court is necessary to give effect to the report of the referees; but no Court of justice of the United States can lend its aid, at any time or in any degree, to recover a debt originating in a source so forbidden, so foul, and so pernicious." In *Wilkerson v. Londonsack*,<sup>c</sup> it is held that the smuggling of prohibited goods into England cannot be made the foundation of an action for not bringing them in a perfect state; and that an action would not lie for the freight of goods in an illegal voyage. It was also ruled, that the intention of the parties could have no influence in determining whether the contract was illegal. 2 Starkie, 117; 4 Dallas, 269, and 308; 6 Massachusetts, 111; and 1 Bosanquet and Puller, 264, furnish cases in which the general rule was recognized and applied. In fact this rule is almost universal; not confined in its operation to this country and England, but it exists in other countries which cherish an enlightened jurisprudence.<sup>d</sup>

Having shewn by the authorities recited, the existence of the rule and its qualifications, so far as important, I next purpose to shew its application; and first to the case of *Carrington v. Caller*. I consider it a proposition too obvious to require proof, that an association, such as the facts shew to have existed, must have had the effect to prevent the government lands from selling at their fair market value. Whatever may have been the effect, such at least was the tendency of the measure, and no case can

JULY 1829.

Carrington  
v.  
Caller.

---

<sup>a</sup> 5 Term Rep.  
599.

<sup>b</sup> 4 Dallas 236.

<sup>c</sup> 3 M. and S.  
117.

<sup>d</sup> Pothier des  
Obligations  
No. 43. & 55.

JULY 1839.

Carrington  
v.  
Caller.

---

be found, where an inquiry has been instituted to shew that an actual loss has been occasioned to the government; and it would be apart from the principle of the rule to require it. It is enough if the plans of the company opposed directly the views of the government; and on this point there can be no doubt. The declared purpose of the company was to purchase the lands as cheap as practicable; the object of the government, as manifested by failing to establish a maximum, was to realize their full value.

The purchase at the company sales did not constitute a substantive contract, distinct from the purchase at the government sales; they were both provided for in the articles of association, and had a reference to each other; the one depending upon the other, and so understood and stipulated before the government sales were made. With what propriety then could the plaintiff argue that the purchase by Caller was disconnected with the purchase by the company? Did not the one grow immediately out of the other, and was not the sale at which Caller purchased, the direct and immediate consequence of the purchase by the company? I have endeavored with laborious attention, to discover the two contracts which we have been told exist; and confess that I have been unable to do so. I view the two sales as constituting distinct transactions provided for by one entire contract. As a play embraces many acts and scenes, which disconnected, are imperfect, and discover not its moral, so the stipulations of the association, in order to a full developement of the contract, must be considered as they were made, altogether.

For the purposes of argument, I might admit that in fact two contracts have been proven, and if in truth it were so, the plaintiff would not be benefitted, if the first contract was illegal; because the second, to use the language of the Court in *Armstrong and Toler*, "would clearly be a promise growing immediately out of, and connected with the illegal transaction." If the members of the company had have divided the lands purchased, before the sales by the company, any disposition by each or either, of his share, would have constituted a new contract, and been recoverable on without regard to the original taint. The case supposed in *Armstrong and Toler*, of advances made by a friend to whom goods had been illegally consigned, with his consent, and of a promise by the owner to indemnify him for his advances, is a

much stronger case of a new contract; yet the Court there held, that the promise constituted a part of *res gesta* and was tainted by the illegal transaction.

JULY 1852.

Carrington  
v.  
Callier.

It has been argued that the defendant cannot object to the payment of his bond, because of the political taint of the contract, unless he has placed the plaintiff in the situation he was in before the bond was executed, or has offered to do it. This argument appears to be an interpolation of the rule by which this description of defence is tolerated. It is proper to examine it. I understand that in relieving against a contract denounced by the policy of a law, the relief is not afforded with a view to favor the defendant, but to discourage contracts which restrain or control the operation of the law; therefore, those principles of justice by the application of which individual rights are settled, are not permitted in such cases to have a controlling influence. In *Holman v. Johnson*,<sup>a</sup> Lord Mansfield says, that it is not in favor of the parties that the objection is ever allowed, but it is founded on the principle of public policy, *ex dolo malo non oritur actio*. "No Court," says he, "will lend its aid to a man who founds his cause of action upon an illegal or an immoral act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of the positive law of the country, there the Court say, he has no right to be assisted." That action was brought to recover the price of tea, sold and delivered by the plaintiff in Dunkirk, in France, with a knowledge that it was to be smuggled into England. Yet he had no concern in the smuggling, but sold it in the ordinary course of his business. The contract was complete by the delivery of the tea at the place of sale. But Lord Mansfield said, "if the plaintiff had undertaken to send the tea into England, or had any concern in running it into England, he would have been an offender against the laws of that country." That is a very strong case in favor of the rule, that political taint vitiates a contract, and conclusive to shew that the doctrine of *in statu quo* is inapplicable. If the defendant might in such case be deprived of this answer to the action, unless he would restore to the plaintiff what he had received, the rule would be inefficient, and the defence afforded by it valueless. If in an action for money had and received, the defendant was compelled to pay the plaintiff so much money as in moral

<sup>a</sup> Cowp. 341.

JULY 1829.

Carrington  
v.  
Callor.

44 Dallas 269.

justice he should account for, before he could allege political taint, the principle of the rule would be disregarded, and the reason of it, which is the discouragement of such contracts, would not be subserved. In *Hawson v. Hancock*, before cited, no effort was made to prevent the defence because the defendant did not offer to pay the money. In *Mitchell v. Smith*,<sup>a</sup> it was objected that the defendant could not be relieved, because he had received the possession of the lands. The Court disregarded the objection, and declared the contract void. I lay it down as a general proposition, that the doctrine of *statu quo* does not apply to a contract void in its inception for illegality, but only to one, which by some *post factum* circumstance becomes so; as if, on a breach of contract by the vendor, the vendee elect to disaffirm, where it has been executed by him either in the whole or in part, he must offer to place the vendor in *statu quo* before he can recover back the money he has paid. And the cases cited by the plaintiff are all of that character.

For the plaintiff it has been argued, that admitting the contract once to have been impure, it has been purged by its recognition by the officers of government. There is nothing in the record which shews this to be the fact; but we will suppose it to be so, with a view to test the force of the argument. The recognition by the government, of the purchases at these sales, can have no influence in determining whether the purposes of the association were impolitic. The policy of the government was declared by an act of the legislative department, and is not subject to the control of either of the other departments; the subject being one exclusively within the control and superintendence of Congress. Let it be supposed that Congress had the sagacity to discover that its policy was unwise, and the patriotism to denounce it; would such an act operate an ablation of all the contracts of the company which were affected by the political stain? I apprehend not. If the contract was illegal when entered into, it is beyond governmental and legislative competency, so far as third persons are concerned, to give to it validity. That such was the case with the contract we are considering is already shewn.

It is further argued, that before we determine that the contract is illegal, we must believe that the acts of Congress under which the lands were sold, were dictated by

JULY 1830.

---

Carrington  
v.  
Caller.

---

a wise policy. I cannot persuade myself that it would be proper for the judiciary to refuse to give effect to a legislative act, because it did not seem to be the result of wisdom. Such a power in the judiciary places it above the legislature, and gives to it, if I may so speak, political omnipotence; it is a power by no means invidious, and one which I shall take pleasure at all times in repudiating. It belongs exclusively to Congress to legislate upon measures which affect the Union, and its acts, within the legitimate scope of its powers, are not subject to revision by any other authority. Least by what I have said it be supposed that I consider the method of disposing of the United States' lands as expedient, I take occasion to say, that I view the system as unwise in theory and ruinous in practice. As ordinary foresight might have anticipated, the government has not in most cases, received exceeding one half the sum which the settler has had to pay for a home; the other half has been paid to the speculator. As fondness for gain is natural, and the land market has promised such an exorbitant increase, as well the charitable and benevolent, as the unfeeling monster who looks at his gold as the hope of his happiness, have engaged in the scheme of speculation.

Having discussed all the points deemed material to be noticed, and having shewn that the bond of Caller is affected with political taint, it remains only to shew that Meggison's bond is subject to the same objection. Meggison was not a member of the company, but agreed with May not to bid at the government sale, on condition that the company would purchase and sell to him, two quarter sections of land, at two dollars per acre advance. The company recognized the contract as to one quarter, and refused as to the other; it was sold at the company sale, and Meggison became the purchaser. The contract with May, and which the company adopted in part, was against the policy of the law; its effect being to do away competition, by a renunciation by Meggison, of his right to bid. If the consideration of Meggison's bond was the eleven dollar purchase alone, I should be inclined to sustain it, on the ground that it would be founded on a consideration disconnected with the company purchase, and therefore free from political taint. But the two purchases by Meggison, constitute parts of one entire contract, for which bonds were given for the purchase money, without distinguishing the amount of each. I have no hesitancy in determin-



JULY 1839.

Carrington  
v.  
Callier.

*a* Crawford's  
Ex'r. v. Mor-  
rell, 8 John.  
195. 1 Chit.  
Pl. 296. 1 T.  
Rep. 201.

ing that his bond is void; because the contract, being illegal in part, as against policy, it is void for the whole. \*

I am accordingly of opinion, that the judgments should be affirmed. \*

By JUDGE CRENSHAW. I am glad that these cases which have been pending for years, and which have caused much excitement and expectation in our southern community, and on the principles involved in which, it is said that immense sums are yet depending, are now, after three solemn arguments, to be decided and set at rest forever.

In the progress of the argument, at every stage of the proceeding, my first opinion has been strengthened and confirmed in the conviction of my own mind; and though it is my misfortune on the most material points to differ from a majority of the Court, yet I have the consoling reflection that my opinion is the result of much deliberation, and as I believe, is well sustained by the rules of law and the principles of justice.

It appears that in the Court below, the judgments on the demurrer to the evidence were in favor of the defendants, and who are also defendants in this Court.

The facts of the cases are spread upon the record, and as far as they have been referred to in the opinion pronounced by a majority of the Court, they have been correctly recited; it is therefore unnecessary for me again to repeat them. I shall only take notice of those positions and legal deductions in which I am constrained to dissent from the judgment of the Court; for to some of them I yield my most hearty concurrence.

It is said that the original object of the land company being to destroy competition at the land sale, and to buy the public lands at an under value, or at the minimum price fixed by law, was against public policy and therefore void. If this rule be generally correct, yet it is at least questionable whether the peculiar circumstances of the cases at bar do not form an exception to the rule. Could it be against public policy for the people to procure lands and a home in the wilderness of Alabama on the best and cheapest possible terms? Will it be contended that an

\* NOTE.—By Judge Collier. Since the determination of these cases, the Supreme Court of the United States, in two cases, Reported in 4. Peters Rep. have fully sustained the view taken in this opinion of the case of *Armstrong v. Toler*.

JULY 1839.

Carrington  
v.  
Callier.

obnoxious law, a law which brought the government as a grand speculator into the land market, and which in effect wrung from the citizens exorbitant sums for a very inadequate consideration; a law which of itself was directly in the teeth of sound policy, is to be regarded with the same reverence which is due to those wise regulations, the salutary effects of which on the happiness of society, have been sanctioned by long experience? It is an unusual course for a nation to pursue in disposing of its domain to its citizens by selling it to the highest bidder at public auction; and at least in this State, has been oppressive to all, and entailed irretrievable ruin on many, by loading the whole community with an immense land debt. During the existence of such a law, it is difficult to believe that any combination of the people for the purpose of buying the public lands at a fair and reasonable price was against public policy. But suppose such combination of individuals with such an object in view, forms no exception to the general rule, and further suppose that some members of the company joined mainly with a view to speculation; it is yet maintainable on principles of law and reason, that the purchasers at the sale by the company, cannot refer back to the mode of acquisition or circumstances under which the company acquired the land from the United States, in order to avoid their contract with the company.

The United States voluntarily sold the land to the company. If the combination on the part of the company was unlawful, and vitiated their purchase, the United States might have complained and set it aside; but with a knowledge of all the circumstances, through their agent, the Register, they acquiesced in the proceedings of the company, and confirmed the sale by receiving part payment and granting certificates to them; with their eyes open they confirmed a contract which otherwise might have been avoided; and thus made it good and lawful, and vested in the company an exclusive right to the land. And all the authorities support the position, that if one party know of the imposition practised, or attempted to be practised by the other party, and if instead of rescinding, he proceed to a completion of the contract, this amounts to a waiver or extinguishment of the imposition, and renders the contract lawful and binding. It must then be conceded on all hands, that the company, by their purchase from the United States, became the legal owners of the

JULY 1830.

Carrington  
v.  
Callor.

---

land, and had a right to sell and dispose of it on any terms they pleased.

As to the case of Meggison, he was not a member of the company, and cannot possibly have any thing to do with the mode or manner in which the company acquired their right to the land. He claims directly from the company, who being the rightful owners when they sold to him, he cannot refer back to the conduct of the company previous to their purchase from the United States, in order to avoid payment of his purchase from the company. To me the doctrine does seem preposterous, and not sustained by law, that after Meggison had purchased land from the company, and with a full knowledge of the imposition, if any had been practised, gave his note for payment, received title, and has since sold the land, he should now be permitted to avoid payment, by a reference back to any circumstance attending the original acquisition from the United States. He has got the land which was unquestionably the property of the company; and does not justice require, and will not the law compel him to pay the price of his purchase to the company who were the rightful owners. But it is here objected that May, a member and agent of the company, agreed with Meggison that he should have the land at an advance of two dollars. It will be recollected that afterwards, by a vote of the company, he actually got one quarter section on those terms: but the company disavowing the authority of May to make the agreement, the other quarter was sold to Meggison at auction for eleven dollars per acre, but instead of then annulling his contract, with a knowledge of all the circumstances, he proceeded to its confirmation by receiving titles from the company, and giving his note for the purchase, and which is the ground of the present action.

I will admit, *pro hac vice*, that May was authorized by the company to make the agreement with Meggison; yet it seems that he placed no reliance on that agreement; for his subsequent conduct in purchasing the land at eleven dollars, giving his note and receiving titles with a knowledge of all the circumstances, is conclusive evidence that he had abandoned May's agreement, and treated it as a nullity, if any such ever existed. And in any point of view, I hold it as absolutely necessary, that Meggison should have offered a restoration of the land to the company, and to have placed them in *statu quo*, before he

could set up such a defence to defeat a recovery on the note. It can make no difference whether Meggison is suing for a rescission of the contract, or whether the plaintiffs are suing to recover the purchase money. In either case the same principle of law and justice applies. In either case, before Meggison could succeed, he should place or offer to place the company in the same condition in which they stood before they sold him the land.

JULY 1839.

Carrington  
v.  
Caller.

As to the case of Caller, the same reasons which create a liability on Meggison, make him equally liable, though he was a member of the company. If the company, by virtue of their purchase from the United States, became the true owners of the land, Caller cannot refer back to the mode of acquisition from the United States, in order to avoid payment for his purchase. The taint of the original transaction was cured or removed by the United States consenting to the sale under the circumstances, before the company resold to Caller: nor can it be readily perceived by what rule of law or logic, the original taint under these circumstances, can be extended to vitiate his contract, and to defeat a recovery of the purchase money. The rule in *pari delicto melior est conditio defendentis* cannot aid him. Though he was a member of the company, and a party to the original combination, yet all the unlawfulness of that combination having been done away by the act of the United States in confirming the sale and granting certificates to the company, at the time of his purchase there was no remaining guilt in the first transaction or purchase from the United States which could extend to or vitiate the company's sale to him. If he, with a knowledge of all the material circumstances, still proceeded to bid for the land, to buy it, to receive titles and give his note, surely he ought now to be held to his bargain. If Caller was afterwards cheated by the master spirits of the association in a division of the profits by the A. B. C. scheme, or other artifice, this happened after the sale by the company to Caller, and cannot affect the validity of the note he had given for the land. After he discovered the fraud, if any, he acquiesced, and cannot now complain, and ought to be compelled to pay the price he agreed to give for his land.

If the defence insisted on were legal and available, it surely comes with a bad grace from Caller, who is said to be equally guilty with the other members of the company in the alleged nefarious transaction.

JULY 1839.

Carrington  
v.  
Caller.

---

But how these men, whether members of the company or not, are to be excused from the obligation of contracts fairly made, with a knowledge of all the circumstances, and that too consistently with the rules of law and the principles of justice, I have not capacity to comprehend. If they have received a valuable consideration from the land company, and surely they have, is it just, and is it not a dangerous doctrine to establish, that though they are permitted to retain the consideration, yet they shall be excused from paying the purchase money?

In support of my opinion *vide* 4 Cowen, 11th Wheaton, and the references contained in the brief of counsel. I however respectfully submit to the judgment of a majority of the Court, and rejoice that this long agitated question is at last decided and put at rest, I hope forever.

a Boardman  
v. Gore &  
Williams,  
1 Stewart  
517.

By JUDGE WHITE. As these cases, in my opinion, depend essentially on the same principles, I shall consider them together. The pleas which went to the delivery of the notes, and the filling of the blanks with the names of the payees, having in effect been disposed of by a case heretofore decided,<sup>a</sup> it only remains to consider of the questions which arise under the pleas of fraud. In the year 1819, at the land sales in St. Stephens, there was a company formed, the object of which was to secure a large quantity of land to themselves, at as small a price as possible. Some wished to secure their own settlements and others to be profited by a resale of the lands bought. To effect this object, and attain the full purposes of the association, they resolved to put down competition. Hence the hopes and fears of many attending the sales were appealed to, with a view to influence them to join the company. On the one hand, they were flattered with the hopes of getting lands by connecting themselves with the company, at a lower price than from the government, and on the other, when it was known that particular persons wished to buy particular tracts including their improvements, they were threatened with the combined wealth and power of the association, in bidding against them. These resorts, as might be expected, were effectual to a great extent, though some held out to the last and would not join. Meggison was of this number. But to induce him not to bid, he was promised two quarter sections which he wanted, at an advance upon government price of two dollars per acre. The business of the company was managed by a committee, and one of

JULY 1859.

Carrington  
v.  
Caller.

---

its fundamental articles was, that none but land buyers should join, each one of whom should advance one thousand dollars. The company bought a great quantity of land, which they soon after resold at public sale, to the highest bidder, requiring from the purchasers one fourth down, and their notes for the balance payable in four years. To effect a distribution of these notes, the names of the payees were left blank, and afterwards filled by allotment. Meggison claimed two quarter sections, in conformity to a contract made with May, one of the company: but the committee disclaimed his authority, and would not ratify the contract to the full extent. They however, let him have one quarter section of the least value, at the advance agreed on, and sold him the other at eleven dollars, for part of the price of which, the note sued on was given. It appears that Caller was a member of the company who sold him land at their sale, and took the note which is the foundation of the action against him for part of the purchase money. The testimony of Colonel Darrington shews, that the names of fictitious persons, and of those who were not land buyers, were put in as stockholders, contrary to the stipulations of the articles of association. These are the material facts, extracted from the vast mass of testimony given. The evidence was demurred to, and a judgment *pro forma* rendered for the defendants. To reverse which, writs of error are now prosecuted.

The first question which arises is, whether this association was contrary to public policy? In examining this point, I do not deem it necessary to inquire into the expediency or in expediency of selling the lands of the United States, upon credit. If the association tended to thwart the object of the laws upon that subject, it may be admitted to have been contrary to public policy, however deleterious the laws themselves may have proven to the community. What then was the object of these laws? Evidently as I conceive, not only to secure to the government the minimum price, but also whatever the lands would command at public sale on the terms of credit proposed, and under the full operation of fair competition. But this combination had a direct tendency to put down such competition, and thus far was contrary to the policy of the statutes, and a fraud upon the rights of the United States. They then could have disaffirmed the sale, and declared it void, and they had a full opportunity of doing this. For the evidence shows that all these transactions were

JULY 1829.

Carrington  
v.  
Callier.

known to their agent, the Register, who, notwithstanding his knowledge and avowed disapprobation of the conduct of the company, proceeded to sanction the sale by issuing certificates. After this, the government could not complain, and the simple question presented for our consideration, is, whether these lands thus acquired by a fraud upon the United States, but which they have waived, could be afterwards sold, without such sales being contaminated by the taint of the original transaction. I admit if it were an attempt on the part of the plaintiffs to establish a claim against the defendants, which would require them to go into that transaction, and it were immoral or contrary to public policy, the Courts would refuse their aid, and they could not recover. But if on the contrary, the notes which are the foundation of the present actions, are so disconnected with, and separated from the original sale, as to be sustained by a new and different consideration, then the actions will lie, and the judgments below should be reversed. All will concede that Courts of justice will not open their forums to enforce contracts which are illegal, immoral, prohibited or contrary to public policy. For to do this would be to sanction by law, what the law itself forbids. This principle, though it approves itself to the good sense of all, and appears simple in its character, is nevertheless, as observed by Chief Justice Marshall in the case cited in 11th Wheaton, sometimes difficult of application; and Courts should take care whilst they observe, not to pervert or abuse it. It might be urged that it would tend to discourage immoral and fraudulent contracts, to restrict the subsequent sale of articles so purchased, by prohibiting the recovery of the consideration for which they should be sold. But it is manifest this would be throwing unwholesome restraints upon commerce, and in many instances furnishing facilities to frauds by the very means employed to prevent them. There must then be some rule, which at once guides the application of the principle to salutary purposes, and prevents its perversion. In the case of *Simpson v. Bloss*,<sup>a</sup> it is said "that the test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his claim." The doctrine of this case is to be found in other books of high authority, and seems to my mind, to strike the safe and sensible medium between the two extremes. Then the whole case, as be-

<sup>a</sup> 7 Taunton  
246.

JULY 1839.

Carrington

v.  
Callier.

fore insinuated, resolves itself into this inquiry, whether the consideration of the notes in these actions, are so separated from the original transaction, as to require no aid from that transaction to enforce their collection? It is admitted they were given for the purchase money of the land, sold by the company at the second sale. But it is contended that as this second sale was contemplated by, and provided for, in the articles of association, it must be viewed as part of one and the same transaction. If this be so, all who purchased at that sale could avoid their contracts, and Meggison must be released as well as Callier. It becomes important then, that this position should be well considered. This single circumstance, that one agreement provides that another should be made, cannot of itself so contaminate the second contract that it should not be sustained. For if such a provision in the original articles of association would have extended to the first sale made by the company, it would equally have affected any other distant and more remote dispositions of the proceeds of the sale, which such articles might have provided for. Suppose for example, they had provided that the lands should be sold, the purchase money laid out in a steam boat, to be plied between certain ports for a number of years, and the profits then divided. Would not the principle contended for prove, that as all these transactions were provided for in the first agreement, every contract made in pursuance of such provisions, could be avoided by reason of the impolicy of the first arrangement out of which they grew; and that too, notwithstanding there might be new and distinct considerations for the support of each? This, it appears to me, is the length to which the argument would carry us, and it evidently leads to consequences too wild and detrimental, to be seriously contended for by any. Should it be said that the notes given for the purchase money at the second sale shall not be collected, because the proceeds were to be divided between the parties to the unlawful combination; then, although the United States, who alone were injured by this combination, waived the fraud practised upon their rights by confirming the sale and conveying a title, the purchasers could not sell again for their own emolument, but must hold the land without the power of alienation. In the cases cited by the defendant's counsel, from 6th, 8th, and 13th Johnson, it was laid down that if two persons agree, that but one shall bid at a sale by auction, with an understanding that



JULY 1839.

Carrington  
v.  
Caller.

the person not bidding should share the profits of the purchase, Courts will not enforce the contract. The reason of this is obvious, for in the first place there was no consideration to support the contract, and in the next place it could not be enforced without going directly into the impolitic transaction. But to make these cases parallel with those now under consideration, we will suppose that the bidders at the auction sale had made a further stipulation, that the articles bought should be resold to third persons for their common benefit, that at such second sale notes were taken and sued on, and the defendants resisted a recovery on the ground of the fraud committed on the rights of the owners of the property sold at auction. Could such a defence prevail, especially after the owners had, with a full knowledge of the fraud, sanctioned the sale by making a title? I presume it could not. But let us more directly apply the test before referred to, as laid down in 7th Taunton, and see whether these notes be founded on the same consideration with the first contract. For if they be so distinct and separate, that the plaintiffs could prove their consideration without deriving aid from the original agreement, they may, and should recover. The first contract, though it provided for the sale which produced the consideration of the notes sued on, was itself evidently sustained by a different consideration. Its consideration was the money advanced by the stockholders; that of these notes, the price of the land sold by the company. The undertaking of the first contract was, to do and have done certain acts for the benefit of all concerned; but the notes contain a promise to pay money to the persons to whom they were given. There is both a difference in the consideration, and the promise or undertaking founded on it. If then, aside from the provisions of the statute of frauds, no notes had been given, and suits had been brought to recover the price of the land, they could have been sustained, on proof of a sale of land to which there was a good title, the possession thereof by the purchasers, and their having bid it off upon the terms proposed. And if they who sold the land, had transferred their claim in the purchase money to the plaintiffs, the names of the vendore might have been used for the benefit of those really interested. Hence it is apparent that in such a state of things, there would have been no call for aid from the original transaction. Gow on Partnerships, <sup>a</sup> after stating several cases in which recoveries could not

JULY 1839.

Carrington  
v.  
Caller.

be had, assigns as a reason: "that in all those cases the claim of the plaintiff could not be established except through the illegal contract." Then I should say, on the supposition that this association was contrary to sound policy, that if one of the parties were to sue to enforce its execution, or to recover the money advanced to carry it into effect, or if one of the stockholders were to claim of the committee their proportion of the profits, they would be compelled to develop the original agreement itself, to get at their rights, and therefore a Court would not aid them. But the purchasers having entered into another contract, for a new and distinct consideration, it would be carrying the doctrine to an unwarrantable length to protect them in both the possession of the land they bought, and the price they agreed to give for it, merely because it was stipulated in the articles of association that there should be a second sale, and that sale did take place. I would ask, if the second sale had been held without being provided for in the first agreement, and notes had not been taken, would not the proof, in an action for the purchase money, have been the same as under the existing circumstances? Where would there have arisen a greater necessity to derive aid from the first agreement in the one case than the other? I can perceive none. Yet it is virtually admitted, that but for the articles providing for the second sale, recoveries could be had. This is said to be the fatal link which so closely binds the two transactions that they must be considered as one and the same. But furthermore, these defendants ask in effect for a rescission of the contracts, contrary to the consent, and without the default of the other party, and for their own exclusive benefit. For they hold on to the land whilst they refuse to pay its price. This is so manifestly contrary to the plainest principles of natural justice and common honesty, that it would certainly require a peculiar concurrence of extraordinary circumstances, and a stern application of a most rigid rule, to sustain such a defence. And it is even said that Caller, who not only enjoys his purchase, but for ought we can know may have reaped a rich harvest from being a member of the impolitic association complained of, is from that very circumstance, in a better condition than Meggison who did not belong to the company. This I cannot believe. Courts of justice do not thus directly favor a *particeps criminis*. It is only where the party claiming of them has to require aid from an illegal transaction, that they escape lia-

JULY 1829.

Carrington  
v.  
Caller.

bility; and as that is not necessary in the present cases, Caller is equally responsible with Meggison. But it is said that Meggison was promised by May, one of the committee, that if he would not bid against the company for certain lands which he wanted, he should have them at two dollars advance on government price; that in consequence of this arrangement he did not bid, yet the company refused to let him have any but the least valuable quarter upon the terms proposed, alleging that May was not authorized by them to make such contract. He afterwards bought a second quarter at eleven dollars per acre, and gave his note, which is the foundation of the present action. It is not material to inquire whether May was authorized to make the alleged contract or not. If he was, and it was supported by a sufficient consideration, Meggison should have stood upon his rights, and insisted on its performance. This, however, he did not do, but gave his note, which was a virtual abandonment of his first contract. I am then compelled to dissent from the opinion delivered by a majority of the Court, and say that the judgments below ought to be reversed.

Judgment affirmed.

JUDGE PERRY concurred with JUDGE TAYLOR,  
JUDGES LIPSCOMB and SAFFOLD, not sitting.

NOTE.—For the plaintiffs, the following authorities were cited. To shew that none but the government could complain, 4 Cowen 744; 5 John. 47, 2 Henn. and Munf. 245, 8 Bibb 515. That the second sale could not be affected by fraud, Gow 105, 5 Taunton 181, 4 John. 204, 7 Taunton 246, 11 Wheaton 258. That the contract cannot be rescinded because the plaintiff cannot be placed in *status quo*, 1 Term Rep. 154, 225, 5 East 449, Hardin 602, 4 Mass. 502, 3 Starkie Ev. 1646, 1614, 6 Munford 366, 1 N. R. 263. That proceeding to complete a contract after fraud is discovered, is a waiver of it, 8 Term Rep. 390, 4 Esp. 264, 10 Wheaton 392, 3 Campbell 69.

The following authorities were relied on for the defendants: as to the insufficiency of the delivery of the notes: 1 John. Cases 114, 12 John. Rep. 418, 10 Mass. Rep. 456, Minor's Alabama Rep. 103. As to the alteration of the note by filling the names of the payees, 2 Starkie's Ev. 479, 480, 19 John. Rep. 391, Bullers N. P. 267, 4 Cranch 60, 3 Am. Dig. 183. That the contract was against public policy, 13 Johns. Rep. 112, 6 Ib. 194, Cowp. 29, 1 Comyn on Contracts 28, 36, 37, Douglass 450, 3 Term Rep. 22, 551, Selwyn N. P. 130, 2 Caines Rep. 147, 444. That the notes were void for fraud, 2 Caines 147, 8 John. Rep. 253, Powell on Contracts 176, 185. That money extorted by duress of goods, may be recovered back in assumpsit, 2 Strange 915.

JULY 1829.  


## GATES V. M'DANIEL AND SPURLIN.

1. G. having a public ferry established by law, M. and S. built a bridge near it, without authority, and suffered all persons to pass free of toll; whereby the profits of the ferry were lost. Held, that it was a violation of the rights of G. and that equity had jurisdiction to restrain M. and S. from using it, except for their own families.
2. As to what constitutes a town, within the meaning of the statute concerning ferries, *quære*.

THIS was a suit in equity, tried on bill and answer in the Circuit Court of Covington county, at October term, 1827.

Samuel Gates had filed his bill in March 1827, charging, that before the sale of the public lands at that place by the United States, Thomas M'Daniel had established a ferry on the Conecuh river, below the falls, in Covington county. That when the land was sold by the government, it was purchased by several persons jointly, among whom were the complainant and defendants. That after the purchase, the owners applied to the County Court of Covington county, and obtained an order for a public ferry, at the same place at which the defendant, M'Daniel, had before kept his ferry. That a part of the land purchased was laid off in lots, for the purpose of making a town; that the whole of the land thus distributed into lots was divided by ballot among the owners; and that in the division, the complainant drew the lots attached to the ferry; that before the drawing, it had been agreed, that no ferry should be kept on any other part of the land. He alleged, that after the division, he had obtained from the County Court an order for a public ferry at the same place, in his own name. He further charged, that notwithstanding this agreement, the defendants had erected a bridge across the river on a part of the land drawn by them, very near to the ferry, on which all persons were permitted to cross, on foot, on horseback, and in carriages, free of charge, by which the profits of the ferry were entirely destroyed; although he the complainant had complied with the law in keeping a good boat and ferryman, and kept the banks in good order, &c. He also alleged, that before building the bridge, M'Daniel had made an application to the County Court, for authority to establish another ferry on said land, which had been refused. Accord-

JULY 1830.

Gates

v.

M'Daniel and  
Spurlin.

ing to the prayer of the bill, an injunction had been granted, restraining the defendants from permitting the bridge to be used for any other purpose than the convenience of their own families.

The defendants, by their answer, admitted the allegations of the bill, except the agreement that no ferry should be established other than the one which had been previously authorized, which they denied. They also denied that the banks leading to the complainant's ferry had been put in good order, and insisted that wagons had been compelled to unload before they could get up the banks; and that the complainant himself had, in some instances, used the bridge.

On the hearing in the Circuit Court, the injunction was dissolved, and bill dismissed with costs, on the ground that the statute prohibiting the establishment of ferries within two miles of a ferry already established, did not embrace bridges; and also that it contained an exception as to ferries at or near a town.

The complainant appealed from this decree, and insisted that it was erroneous.

SHORTBRIDGE, for the appellant. The bridge was both a public and private nuisance. It was a public nuisance, because it was unauthorized by law, and it obstructed the Conecuh river, which was declared by statute to be, below the falls, a navigable stream and public highway.<sup>a</sup> As a public nuisance, it was liable to be abated. Its erection violated a penal law,<sup>b</sup> because it was not allowed by the County Court; and this, whether the stream was navigable or not. It was a private nuisance, because it destroyed the profits of the ferry of Gates, the complainant; in which he had a legal vested right.<sup>c</sup> Courts of Chancery will restrain the injury occasioned by a nuisance, on the ground that it is better to prevent the injury, than to redress it afterwards.<sup>d</sup> As to the town, none was ever incorporated there, and judicially, it cannot be considered as such.

VANDEGRAAFF and PARSONS, for the defendants, cited Co. Lit. 115, 10 Mass. Rep. 71, &c.

By JUDGE TAYLOR. The statute of 1820, section 17 provides, "that no public ferry shall be established within less than two miles by water, of any ferry already established, unless on any river at or within two miles of any town." And by the 20th section of that act, it is

<sup>a</sup> Act of 1821,  
Laws of Ala.  
717.

<sup>b</sup> Laws of Ala.  
397, 8.

<sup>c</sup> 3 Bl. Comm.  
219. 2 Roll.  
Abr. 140. 1  
Haywood's  
R. 457.

<sup>d</sup> 6 John. Ch.  
R. 439, 497.  
1 John. Ch.  
R. 611.

declared, "that if any person or persons shall establish a public ferry or a public road, toll-bridge, or causeway, contrary to the provisions of this act, he or they shall forfeit and pay five hundred dollars" &c. The meaning of this last section clearly is, if a toll-bridge &c. should be established without an order of Court, then the forfeiture shall be incurred. But as this is not a toll-bridge, it does not come within the words of the statute, which is penal and must be strictly construed.

JULY 1839.  
 Gates  
 v.  
 M'Daniel and  
 Spurtin.

What is the reason that persons are prohibited from establishing a public ferry within two miles of another? Clearly because the owner of the first has entered into onerous engagements when he obtained the order to establish his ferry. He has become bound to keep good boats, constant attendance, &c. this requires that he should receive compensation, and it is important to the community that he should observe faithfully the engagements he has entered into. Unless he has some such protection, his ferry will become profitless, of course will be neglected, and travellers and others meet with great delays. But will the object of the general assembly in affording this protection be defeated by the erection of a bridge within the prohibited distance? Certainly, much more effectually than by establishing a ferry. It is said though that in the record, there is some showing that this place came within the exception, as there was a town where this bridge is built. I am far from being satisfied that there was a town within the meaning of the act; but it is a sufficient reply to this objection, that this bridge was not established by order of the County Court.

Apart from all statutory provisions, except those which relate to the establishment of the ferry, I am decidedly of opinion that the defendants had no right to build a public bridge within the immediate vicinity of the ferry, calculated to destroy the profits of the ferry. The complainant had regularly made his application to the County Court, entered into bond as the law directs, and was liable to be sued on that bond if he failed to comply with its conditions: certainly then he must receive the protection which he had a right to expect when he gave this bond, and without which it will not be in his power to fulfil its conditions. In a case reported in 1 Johnson's Chancery Reports, \* it is determined that "an injunction will be granted to secure to a party the enjoyment of a privilege conferred by statute, of which he is in the actual pos-

JULY 1829.

Gates  
v.  
M'Daniel and  
Spurlin.

session, and when his legal title is not put in doubt. As when a turnpike company, incorporated with the exclusive privilege of erecting toll-gates and receiving toll, had duly opened, and established the road with gates, &c. and certain persons with a view to avoid the payment of toll, opened a by road near their turnpike, and kept it open, at their own expense, for the use of the public, by which travellers were enabled to avoid passing through the gates, and paying toll to the plaintiff; the Court granted a perpetual injunction to prevent the defendants from using or allowing others to use such road, and ordered the same to be shut up.<sup>a</sup> This case is so precisely in point, that it is needless to comment upon it.

<sup>a</sup> See also 1  
Haywood  
457.

The decree of the Court below must be reversed; and this Court proceeding to render such decree as should have been rendered below; it is ordered, adjudged, and decreed, that the injunction be reinstated and perpetuated, and that the defendants pay the costs of the suit.

JUDGE CRENSHAW, not sitting.

### CATO V. EASLEY.

1. A party may it seems, in Chancery, be joined as defendant for purposes of discovery merely.
2. Minors, defendants in Chancery, having been admitted to make full defence by their general guardian, the revising Court will consider the sanction given to such mode of defence, as equivalent to an appointment of a *guardian ad litem*.
3. A voluntary settlement in favor of children, set aside as fraudulent, as against an existing creditor, under the circumstances.
4. The statute fixing a time within which minors can impeach a decree rendered against them, it is no error that a time is not fixed in the decree for that purpose.

IN a bill in Chancery filed in 1824, by Roderick Easley in the Washington Circuit Court, against Lewis Cato, the following facts were charged, viz: That one Wyche Cato died intestate, leaving his widow, Martha Cato, and four children, Burrell, Feraby, Franklin and Green, who were minors; that he left a considerable real and personal estate; that Lewis Cato administered; that at a sale in July 1817, of a part of the property, the widow purchased to the amount of \$773 12, and gave her note to

JULY 1830.

Cato  
v.  
Easley.

the administrator for that amount, payable in six months, which the complainant signed as her security, because as he alleged, there yet remained property in the hands of the administrator undivided, her portion of which would be sufficient to satisfy the debt due by her, as he believed; that by a distribution of the property, she received among other things two slaves, Rodah and Sarah, which Lewis Cato, the administrator, delivered to her; that she afterwards intermarried with one J. H. Irons, but before so doing, she, by a voluntary deed, conveyed the negroes, together with other property, to the four children; that afterwards she died, and after her death, Lewis Cato, as guardian of the children, took possession of the two slaves, Rodah and Sarah, for their benefit. He further charged, that after the lapse of a considerable time, in April 1821, Cato, as administrator, brought suit against him on the note, and that he recovered in Marengo Circuit Court, in April 1822, judgment against the complainant, for \$508 50 debt, \$28 77 damages and costs; that complainant believing the claim unjust, resisted it, and obtained an injunction to stay the collection of it, but was compelled to pay for the debt, interest, damages and all costs \$858 31, as shewn by documents exhibited. The bill alleges, that the conveyance of the two negroes and other property by Martha Cato to her children, made when she owed the note to the estate, and without reserving property to satisfy the debt, was a fraud in law, and that they were subject in the hands of the guardian to satisfy the complainant's claim; that Lewis Cato for the benefit of the children, was in possession of the negroes, of the property for which the note was given, and also of the money collected of the complainant, all which was subject to distribution among them. The complainant prayed that Lewis Cato might be made defendant as administrator, and also as guardian to the children, that he might make full discovery of all the matters charged, of what property the widow received, what her dower was &c. &c. And that the property of the minors in his hands, or so much as was necessary, might be made liable to reimburse the complainant &c. \*

The children answered by Cato their guardian, and Cato answered also in the character of administrator. The answer on behalf of the infants, states that they are strangers to the matters of the bill; they admit that their

\* It appears a demurrer was filed by the defendants to the bill, but the record does not shew the particular disposition of the demurrer.



JULY 1829.

Cato  
v.  
Easley.

mother, previously to her marriage with Irons, and with his knowledge, and at his request, conveyed to them the two slaves and her distributive share of the personal estate, except the stock of cattle and hogs, with a view of placing said property beyond the control of her intended husband; and insist the deed was made *bona fide*, and not with intent to hinder or delay creditors; and being infants, they pray the full benefit of their rights. In the capacity of administrator, Cato answers, admits the making of the conveyance, but denies the intent to defraud either Irons or her creditors, and says that the deed was made *bona fide*, with the assent of her intended husband, and at his request, to prevent the property from being subject to his control, or to the payment of his debts. He answers further that Wyche Cato died seized of 250 acres of land, which rented for \$210 per annum, out of which said Martha Cato was dowable, and that in her lifetime she received her distributive share of Wyche Cato's estate, with the exception of about thirty dollars; that Irons, during the marriage, sold cattle which he acquired by her for about \$800; that when she made the deed she was in perfect solvent circumstances; and admits that the property conveyed in the deed was delivered to the minors. The defendants also insisted by way of demurrer, on the insufficiency of the bill.

At April term 1827, the cause was tried in the Court below, as the decree recites, on the bill, answer, exhibits, and proofs referred to in the complainants' bill; when, by the Chief Justice, a decree was rendered, subjecting the slaves Rhoda and Sarah to the reimbursement of the complainant of the debt, damages and costs recovered by Cato against Easley, amounting to \$899 17, and interest thereon; and ordering the sale of the negroes, unless Cato the administrator should pay the amount; and also that the defendants should pay the costs of suit. \*

This decree, Cato insists is erroneous, and to reverse it, he sued a writ of error to this Court.

SALLE, for the appellants. The object of the bill is, either to set aside the deed conveying the two negroes to the minors, and subject them to the re-imbursement of the money paid by Easley; or to discover what other property Martha Cato would have been entitled to, wheth-

\* In the decree it is recited that it appeared the slaves were purchased at the sale, and that the note was given for them.

er real or personal, upon a full and final distribution of the estate, that it might be subjected in like manner.

The objections to the bill, and which were available on demurrer, are:

JULY 1839:

Cato  
v.  
Easley.

1. That the minors are not made parties. All persons interested and within the jurisdiction of the Court must be made parties. The bill should be filed against the minors as against all other persons, and should have prayed the Court to assign them a guardian *ad litem*. Instead of this, the bill was filed against the administrator, who was their guardian in socage.

2. Lewis Cato, as administrator, was improperly charged. As such, he was not liable for any debt contracted by the widow, and no decree should be had against him. If a discovery of the amount of Wyche Cato's estate was the object, it should have been sought of the minors, and the administrator examined as a witness. But at all events, as the discovery shews he had effects as administrator only to the amount of thirty dollars, no decree should be rendered against him for any greater amount. Again, if made a defendant for purposes of discovery merely, when he made such discovery, he should be discharged and allowed his costs.

3. James H. Irons, having married the widow, he took her *cum onere*; the bill shews her liability, and he should have been sued as her husband, by the complainant. But even in this proceeding, she should have been made a party, or her husband as her administrator.

But on the discovery made and the answer, as the cause stood on the bill and answer, and the answer denying all fraud and the equity of the bill, it was error to decree against the answer, unless disproved by two witnesses, or one witness and corroborating circumstances.\* The question is, was the conveyance fraudulent as to creditors? It is denied that the deed was made *mala fide*, or with intent to defraud creditors or any one else; it was with the assent of the future husband, and on good consideration. As to the insolvency of Martha Cato, when she made the deed, so far from this being the case, it appears that her husband Irons received by her cattle, which he sold for \$800. The answer alleges she was solvent. It appears she was entitled to dower out of real estate, worth \$210 per year; even at the filing of the bill a balance of \$30 was yet due her from the estate. The conveyance was an ante-nuptial one; true it was voluntary, but volunta-

\* 9 Cranch,  
2 Foubt. Title  
Discovery.  
7 John. Ch.  
Rep. appe' d.

JULY 1830.

Cato  
v.  
Easley.

a 2 Cowper  
707.

ry conveyances are not fraudulent because they are voluntary; they are void only if fraudulent. What then are badges of fraud in such cases? Nothing but the insolvency of the party will avoid a voluntary deed, or such an indebtedness as can leave no doubt upon the mind, of the intention of the grantor to defraud. The answer shews the indebtedness of Mrs. Cato not to be such. In *Dole v. Routledge*,<sup>a</sup> Lord Mansfield thus expresses himself: "The statute does not say a voluntary settlement shall be void, but that a fraudulent settlement shall be void. It is laid down in a case by Hale, that a voluntary settlement may be good, and the cases cited from Talbot and Wilson, support that doctrine. I remember a case before Lord Hardwick, where a woman was possessed of an estate, and having children by a former husband, was about to marry again; but before she married, and because she was going to marry, she made a voluntary settlement of her estate upon her children. Her second husband afterwards persuaded her to join in a sale of this estate for a valuable consideration, and the question was, whether this settlement was void? The Court held that her doing a rational act, without any intention of fraud or of defeating any body, would not render the settlement fraudulent, though it was absolutely voluntary. The name of this case was *Newstead v. Searle*." Lord Mansfield, a little further says: "One great circumstance which should always be attended to in these transactions is, whether the person was indebted at the time he made the settlement." The question here recurs, indebted to what amount? The books all declare that the party must be insolvent, for every man owes his daily bills. The cases are all carefully collected in Newland on Contracts, to which I refer.<sup>b</sup>

b Also, Rep.  
per Prop. 305,  
307, 310.

The decree is certainly erroneous as to the amount. Easley says he obtained an injunction, which was dissolved; the original amount of the judgment was \$598 50 debt, \$28 27 damages, and \$15 costs; this was increased to \$858 31 by the wrong course adopted; so that now the appellant has been decreed to pay upwards of \$1250, besides costs. It is contrary to equity to charge the appellant with an accumulation occasioned by Easley's errors.

c 3 John. Ch.  
Rep. 367.  
John. Dig.  
271. 1 Atk.

No time is fixed by the decree within which the minors are allowed to impeach it; this is error.<sup>c</sup>

PARSONS and LYON, for the appellee. All the parties which the forms of the law require, are before the Court; the decree ascertains the facts as appearing by proof, as

JULY 1879.

Cato  
v.  
Easley.

alleged in the bill, and they are sufficient to sustain the decree. Lewis Cato was guardian to the children, and the objection made on this ground is mere matter of form; he was also the administrator, he credited Martha Cato; he delivered to her the proportion she was entitled to of the estate, instead of retaining so much as was necessary to pay this debt; he received the negroes for which this debt is contracted; and he undertakes to compel Easley, her security, to pay the debt; so that he holds the money and negroes both, to be distributed to the children, his wards. This is certainly not allowable in equity. He is liable to refund as far as the value of the negroes extends, and no one can be injured by it.

By JUDGE COLLIER. So many of the points presented by the assignment of errors as it is deemed material to notice, may be thus succinctly stated.

1. Could the administrator of Wyche Cato have been properly made a defendant to the bill of the appellee?

2. Should the wards of the appellant have defended by a guardian *ad litem*?

3. Is the deed of gift made by the mother, who was largely indebted at the time, as against existing creditors, void *per se*?

4. Was it necessary to have expressed in the decree, a time when the infants, on attaining full age, should be permitted to impeach it?

5. Is not the decree rendered for too large a sum?

The first point makes it necessary briefly to state the facts. Wyche Cato, the father of the wards of the appellant died intestate, possessed of a considerable real and personal estate, on which the appellant administered. A part of the estate was sold by the administrator, and purchased by Martha Cato, the mother of the wards, and widow of the intestate, who made her note therefor with the appellee as security, payable six months after date. After the making of the note, she conveyed her property, without any valuable consideration, to her children, and the appellee has been compelled to pay it with interest and costs. To reimburse himself this suit was brought, to subject the property thus voluntarily conveyed, to the payment of this demand.

Perhaps it was unnecessary to have made the administrator a party to the bill, unless a discovery was sought from him for some purpose. It does not appear whether

JULY 1899.

Cato

v.

Easley.

the obligations of the appellee, which it was essential to prove in order to a decree in his favor, could have been proved without the benefit of his answer. The bill merely shews, that by written testimony the appellee could have shewn the amount paid by him, but not that he could prove that he was the security of the mother. And for any thing appearing to the contrary, the administrator may have been a party, that a knowledge of that indispensable fact might have been acquired by his answer. Be this however as it may, the decree of the Court below cannot be affected by it, as there is no decree against the administrator as such, and in that character he has no right to complain of it.

The record does not make it necessary for the Court to decide in this case the abstract question, whether infants should defend by a guardian *ad litem* where they have a general guardian. The names of all the infants are set out in the bill; their names and the name of the appellant as their guardian, are recited in an order made by the Court upon the bill, and before the coming in of the answer; they all profess to answer by their guardian in usual form. From these facts appearing on the record, the Court might infer that the appellant was either appointed as their guardian to defend this particular suit, or if not appointed, that he was recognized as such, which may be considered as tantamount to a special appointment. In Virginia it has been holden, where a suit against infants in Chancery was defended by a guardian appointed by the County Court, and the answer of the guardian was received for them, and full defence made under the sanction and authority of the Court, that the infants were equally bound by such defence, as if their guardian had been appointed in form *ad litem*, by the Chancery Court.<sup>a</sup> This decision we have no hesitation in recognizing as law. Again, if the appellant had no authority to defend for the infants, the objection, we are inclined to think, should be taken by them on attaining full age, and not by the appellant now, because he would have no right to bring their case into this Court, for want of the authority of which he complains.

It is a well established rule of the common law, that all conveyances made with an intent to delay, hinder and defraud creditors, are fraudulent and void, and our statute of frauds and perjuries is declaratory of it.<sup>b</sup> And it is a legal inference, that a voluntary settlement or conveyance,

<sup>a</sup> Beverleys  
v. Miller,  
6 Munf. 99.

<sup>b</sup> Laws of Ala.  
244.

made by one indebted at the time, is, as against such creditors, fraudulent, and absolutely void. It appears that the debt which was paid by the appellee, and for which he seeks an indemnity, was existing at the time of the conveyance, though not in his hands. The effect of the payment by the appellee as security for the mother, was not an extinguishment of the equitable lien which the administrator had on the property conveyed; at law the debt was extinguished; in equity it is continuing; and the appellee is considered as standing in the same situation in regard to the property conveyed, as the administrator did; and every facility which he had in equity for the collocation of the debt, was transferred by the payment, to the appellee. The doctrine in relation to voluntary conveyances is very fully considered in the case of *Reade v. Livingston and others*; <sup>a</sup> The learned Chancellor collects and reviews the most prominent of the English adjudications upon the subject, and maintains, that a conveyance without valuable consideration, by one indebted at the time, is fraudulent in law against existing creditors, and that the intention of the donor determines the validity of such conveyance, as against subsequent creditors, which intention must be ascertained by the circumstances accompanying and following the conveyance. In Wheaton's Reports and Johnson's Chancery Reports, the same doctrine is recognized. <sup>b</sup>

With regard to the objection that no time is expressed in the decree when the infants shall impeach it on attaining full age, it is enough to say, that the statute prescribes the time; and that therefore it need not be repeated in the decree. <sup>c</sup>

The decree is for a larger sum than appears to have been due the appellee. For that cause it must be reversed, and rendered here for the sum which seems to have been due, including interest, and the costs of the suit of Wyche Cato's administrator against the appellee; \* to be collected by a sale of the property described in the decree, if it be not sooner paid; and the appellee must pay the costs of this Court.

Decree reversed and cause remanded.

\* The decree was rendered for \$971 01.

JULY 1839.

Cato  
v.  
Easley.

a 3 John. Ch.  
Rep. 481.

b 11 Wheaton  
199. 8 Wheat.  
242. 4 John.  
Ch. Rep. 450.

c Laws of Ala.  
492.

JULY 1828.  


## SMITH V. HUNT.

1. In an action by a surviving partner, on a note made to the firm, it is not necessary to prove the partnership or survivorship; the note is sufficient evidence.
2. If the plaintiff is not the person properly entitled, and the objection does not appear on the face of the pleadings, it must be shewn by the defendant by plea or proof.

HUNT, as surviving partner, instituted an action of assumpsit in Autauga Circuit Court, against Smith, and in his declaration alleged that George Wilkinson and himself were copartners under the firm of George Wilkinson & Co.; that the defendant had made a note payable to them in the following words:

"§ 279 9-100. One day after date I promise to pay George Wilkinson & Co. or bearer, two hundred seventy-nine 9-100 dollars for value received, 15th January, 1824.

DAVIS SMITH,"

and further alleged, that said Wilkinson had since died, and that he was surviving partner, &c. The defendant pleaded the general issue.

At the trial at May term 1827, to support the issue on the part of Hunt, the note was read to the jury, and no further evidence was offered. The defendant demurred in law to this evidence as insufficient, and the court gave judgment on the demurrer for the plaintiff; which is here assigned by Smith as error.

GOLDTHWAITE for the appellant, contended, that to enable the plaintiff to support his action, it was necessary for him to allege, 1st that the firm consisted of himself and Wilkinson, and 2d, the death of Wilkinson before suit brought, and his survivorship. <sup>a</sup> If the death of Wilkinson was not stated, could Hunt sue alone as payee? The declaration would then shew a joint interest in him and Wilkinson, and the nonjoinder of Wilkinson would be fatal on demurrer. <sup>b</sup> It is then clear that the allegation of Wilkinson's death is material to enable Hunt to maintain the action in his own name, and if it is material for him to allege it, it is equally so for him to prove it. The general issue puts the plaintiff on proof of every material fact stated in his declaration, unless he be suing in *auter droit*; <sup>c</sup> even a husband suing for a consequential damage for an injury done his wife, must give *prima facie* evi-

<sup>a</sup> 3 Chit. Pl. 19, 20. 2 Chit. Pl. 24.

1 Saund. 425. Gow on Partnership 172.

<sup>b</sup> 1 Chit. Pl. 6 *Marg. P. 8.*

<sup>c</sup> 1 Chit. Pl. 469. Peake on Ev. 214. 3 Bl. Comm. General Issue.

dence of his marriage. <sup>a</sup> An administrator, if he declare on a cause of action in his own time, must prove his title as such. <sup>b</sup> So in an action by a corporation, under the general issue, they must prove they are such. <sup>c</sup> It is equally necessary to prove the allegation that Hunt was a partner, to entitle him to maintain his action; it is the only way in which he could have an interest in the note as payee. The authorities referred to will prove this. A surviving partner cannot recover in an action of assumpsit without naming his deceased partner in the declaration; <sup>d</sup> where death is averred, it is necessary to prove it. <sup>e</sup>

**BUGBEE, contra.** Hunt has possession of the note, and whether he be bearer or surviving partner, he is entitled to his action. It is not to be presumed that he would sue in a false character, which would curtail his rights. His proof shews an entire cause of action in himself; his consent that another should participate, does not injure the defendant; this is a negotiable instrument; where a bill or note is payable to bearer, or is indorsed in blank, possession is *prima facie* evidence of delivery and of ownership. <sup>f</sup> He who has possession, may receive payment, and a recovery by him is a good bar.

Formerly a plea in abatement was the only mode in which advantage could be taken of a misjoinder or non-joinder of either plaintiffs or defendants; and the reason advanced for a different practice in some cases is, that the defendants are not supposed to know all the parties plaintiffs; this reason here cannot apply. Chitty says, "If one of several obligees be dead, the fact should be stated, or the defendant may crave oyer and demur. But if the plaintiff be prepared to prove the death of the party, the omission of the statement of the death would be no ground of nonsuit." <sup>g</sup>

An administrator suing for a debt due his intestate, need not prove his authority, unless oyer is craved; and husband and wife may sue without any proof of marriage. <sup>h</sup>

**By JUDGE PERRY.** It is contended that the plaintiff was bound to prove that he was one of the firm of George Wilkinson & Co. and also the death of his copartner. The position assumed by the counsel for the plaintiff in error cannot be applied to the plaintiff below, inasmuch as it would have formed a good defence for the defendant; and if he wished to avail himself of it, it was incumbent on him to shew that there were other parties

JULY 1820.

Smith  
v.  
Hunt.

<sup>a</sup> 2 Starkie's  
Ev. 689.

<sup>b</sup> 2 Starkie's  
548. 549.

<sup>c</sup> 8 John. R.  
378; 10 John.  
154; 14 John.  
245; 2 Cowen  
378.

<sup>d</sup> 14 East. 210.  
3 Starkies  
Ev. 1070.

<sup>e</sup> 2 Starkies  
Ev. 457.  
note.

<sup>f</sup> 2 Starkies  
Ev. 250.

<sup>g</sup> 1 Chit. Pl.  
7.

<sup>h</sup> 2 Starkies  
Ev. 486. See  
also, 2 Saund.  
122. 1 John.  
Rep. 34. 8  
Caines Rep.  
170. 1 Starkie  
on Ev. 21, 22.



JULY 1839.

Smith  
v.  
Hunt.

α 1 Chitty Pl.  
6.

β 2 Starkies  
Ev. 127.

to the contract who were not joined as plaintiffs in the action. This he could have done if the objection appeared upon the face of the pleadings, by demurrer, by motion in arrest of judgment, or on error; and though the objection may not appear on the face of the pleadings, the defendant in the court below could have availed himself of it either by plea in abatement, or as a ground of nonsuit on the trial, upon the plea of the general issue. <sup>a</sup> The principle here laid down clearly shews, that the want of proper plaintiffs in actions on contract, is an exception to the merits, which may be taken advantage of by the defendant to defeat the plaintiff's recovery. He may shew that the agreement was under hand and seal, for then the form of the action was mistaken; that the action has not been brought by the proper parties, the promise having been made to the plaintiff jointly with others, &c. <sup>b</sup> The case is too clear for argument. It is therefore the opinion of the Court, that the judgment be affirmed.

### SMITH V. DAVIS *et al.*

In an action brought by copartners as payees, on paper made to them by their firm name, no proof of the copartnership is necessary. If the proper parties have not brought the action, it is matter of defence.

THIS case was tried at the same time as the last, and in the same manner. The declaration, which was in assumpsit, averred that P. Davis, E. Faxer and John Kirby, were copartners; and the only proof produced was a note made by Smith to P. Davis & Co. On the demurrer of the defendant below to the plaintiff's evidence, judgment was given for the plaintiffs, who are appellees in this Court.

GOLDTHWAITE, argued for the appellant, that when a firm sue as payees or as indorsees, by virtue of any other than a blank indorsement, under the general issue, they are bound to prove their identity and copartnership. <sup>c</sup>

BUGBEE for the appellees.

By JUDGE PERRY. This case depends upon the same principles as the last. The judgment must therefore be affirmed.

<sup>a</sup> Gow on Part.  
170, 186. 2  
Starkies Ev.  
250. 1 Chittys  
Pl. 294, 469,  
Peakes Ev.  
214.

JULY 1830.

## M'WHORTER V. SAYRE &amp; SAYRE.

It is error to render judgment for more damages than laid in the declaration.

THIS action involved the same points as the two preceding. In addition thereto, it was assigned for error, that the damages in the writ and declaration were laid at \$130, and a verdict was found for \$268 93, and judgment was rendered for that amount. The action was in assumpsit.

GOLDTHWAITE, for the appellant. This is certainly erroneous. \* Since the suing of this writ of error, a remittitur has been entered; but a remittitur cannot be entered at a subsequent term. †

a Minor's Ala.  
Rep. 89, 93.  
1 Stewart 18.  
b 2 Strange  
Rep. 1116.

BUGBEE, contra.

By JUDGE PERRY. It appears that the jury assessed damages largely beyond what were claimed in the declaration, and judgment was entered thereon. This was error, and has been so several times decided in this Court. For this the judgment must be reversed and the cause remanded.

JOHNSTON *et al* V. ATWOOD.

1. The act giving summary judgment in this Court, on motion, against securities in writ of error bonds, is not repugnant to the constitution.
2. Nor is the exercise of that power to be considered as the assumption of original jurisdiction by this Court.
3. A party may in certain cases, by acts of record, waive his right of trial by jury.

THIS was a writ of error sued to this Court by Johnston and M'Grew, to reverse a judgment of the County Court of Marengo county, rendered against them in favor of Atwood, on the trial of an appeal from a magistrate's Court. At a previous day of the term, the judgment of the Court below was, on the errors assigned by Johnston and M'Grew, affirmed in this Court; and under the statute, in the usual form, judgment was rendered against

JULY 1829.  
  
 Johnston et al.  
 v.  
 Atwood.

---

Johnston and M'Grew, and against Lewis Parham, who was their security in the writ of error bond.

STEWART, on behalf of Parham, the security in the error bond, moved this Court to set aside the judgment as to him. Two grounds were assumed in the argument, on which it was contended that this Court had no power to render such a judgment, to wit: 1st, that it was the exercise by this Court of original jurisdiction, which this Court has not; 2d, that the act under which the authority was exercised is unconstitutional, as there is no mode provided for the trial of the liability of the security by a jury, this being a revising Court merely.

PICKENS for the appellee.

By LIPSCOMB, Chief Justice. In this case, judgment has been entered during this term against the security in the writ of error bond; and a motion is now made to set aside that judgment, on the grounds, 1st, that in the rendition thereof, this Court has exercised original jurisdiction; 2d, that it is a violation of the constitution to render a judgment without the intervention of a jury. These points have been pressed with much ingenuity and ability by the counsel, and if he has failed to establish his positions, he has at least shewn that much mischief is to be apprehended from rendering judgment in this Court, against securities. But with considerations growing out of this aspect of the case, we can hold no communion. We have only to inquire whether the judgment is authorized by law or not. This Court cannot, it is true, exercise original jurisdiction; but to determine what is an exercise of original jurisdiction, we must test it by applying it to the subject matter on which such jurisdiction has been exercised. Original jurisdiction has been exerted over the subject matter in controversy between the parties litigant in the Court below, and when we render judgment here against the security to the writ of error bond, we are not exercising original jurisdiction, because the subject matter of the controversy had been previously adjudicated, and we are only inquiring if that judgment is correct; if correct, as an incident to the affirmance, judgment is rendered against the security in the writ of error bond. On the record, for so I shall call the writ of error bond, we find the name of a party, not originally a litigant in the subject matter of controversy, but who has come into the record after judgment, and makes himself *quasi* a par-

ty to such judgment, by undertaking that judgment may be rendered against him, if the Supreme Court should affirm it. This is the legal effect of his undertaking. And we have no facts to inquire into, as to his right or liability, that the record will not answer.

On the 2d ground, it is contended that the security has a constitutional right to be tried by a jury. The constitution, in guaranteeing the right of trial by jury, never intended any thing more than securing to the party a right to have contested facts tried by a jury. It never could have been designed to have so far changed the whole doctrine of evidence, as to have records tried by a jury; when a debtor acknowledges his debt of record, he leaves no contested fact to be tried by the jury. In the case of *Logwood v. The Huntsville Bank*,<sup>a</sup> it was said by this Court, that "what had never been demanded could with no propriety be said to have been denied, and that the defendant had never claimed a trial by jury." And it might further be urged with much force, that the demand of a jury trial should be made at such time, and in such form, as the law had prescribed for pleading, and for the ascertainment of the material facts. Were this not required, a party might insist, that he had a right to be heard by a jury in this Court. The security at the time he entered into the writ of error bond, knew all the consequences of thus making himself a party to the judgment in the Circuit Court; he knew that the cause then went to a tribunal where the facts were not inquired into, beyond what was apparent on the record; and his volunteering himself as a party under such circumstances, was virtually a waiver of all claim to a jury trial. There are many cases where a party by his own act, deprives himself of a jury trial. By executing a power of attorney to confess judgment, he may waive his jury trial. Executors and administrators are made parties in this Court, and their rights to some extent adjudicated, without the intervention of a jury, because that they came into the record as parties, after the subject matter of the suit had been tried in the Court below. If fraud has been practised, the Courts of Equity are generally competent to administer relief, we might however as soon suppose fraud and forgery in sending up any other part of the record by the clerk, as that he would certify falsely that the security had joined in the writ of error bond, when in fact he had not.

The motion must be overruled.

JULY 1829.

Johnston et al.  
v.  
Atwood.

<sup>a</sup> Minor's Ala.  
Rep. 22.

JULY 1827.

## ANONYMOUS.

1. When a statute merely gives a remedy to enforce an existing right, without creating or affecting any right or obligation, it may act retrospectively.
2. The act of 1827, authorizing executions from this Court to issue for costs in certain cases where they are due from the successful party, applies as well to judgments rendered before, as to those rendered after the passage of the act.
3. The costs chargeable against the successful party include all, except the appearance of the opposite party, and such acts as are done at his instance.
4. An execution cannot be quashed because more costs are taxed than are properly due. The error can be corrected on a motion to retax.

Acts of 1827  
Page 86.

Under the act of 1827, <sup>a</sup> divers executions were issued by the clerk of this Court, dividing the costs, where executions had been previously issued against the unsuccessful party and were returned no property found. Some were issued against plaintiffs in error, and some against defendants; and many were on judgments rendered in this Court, before the act passed. The act referred to as authorizing such executions, is in these words: "That the clerk of the Supreme Court is hereby authorized, whenever any sheriff or coroner shall return an execution directed to them or either of them, that the defendant or defendants in said execution or either of them have no property in his county, out of which he can make the amount of costs due on said execution, forthwith to issue execution against the plaintiff or plaintiffs in said execution, for all costs due on said execution created by the plaintiff or plaintiffs in obtaining his judgment and execution; and no costs created by any defendant or defendants on the part of him or them, shall be taxed or collected in said execution; provided that an execution which may be returned no property found, shall have issued to the county from which the case was brought into said Court, before an execution under this act shall issue against the plaintiff or plaintiffs." Motions are now made to quash the executions, on two grounds, viz: 1. That the act of 1827, does not authorize executions to issue on judgments rendered previously to its passage. 2. That more costs are taxed than were created by the parties against whom they were issued.

By JUDGE PERRY. It is a question of no small importance, whether a person entitled to execution under former laws must take the steps authorized by the laws in

JULY 1829.

ANONYMOUS.

---

being at the time of the rendition of the judgment, in order to have the same satisfied, or whether he may avail himself of a statute subsequently passed? This question is involved in the construction of the act above recited, as to its repugnancy to the nineteenth section of the bill of rights, contained in the constitution, which says no *ex post facto* law, nor law impairing the obligation of contracts, shall be made. From this clause in the constitution, we cannot suppose that the framers of it intended to inhibit the legislature of this State from enacting any law to secure to her citizens, their rights, when the remedy for their enforcement would have to act retrospectively. This opinion is not in conflict with the principle of construction, that statutes should not act retrospectively: that rule is founded on the common law, and took its rise upon a supposed intention in the law makers, not to enact laws calculated to affect anterior rights. The common law construction being founded upon that supposition, its influence cannot prevail when a different intention is clearly manifested. The act then in question, not having impaired any rights or obligations that existed between the parties previous to its passage, but only providing a remedy for their enforcement, cannot be within the prohibition of the constitution. Apply the principle to the case under consideration, and it will be found that the clerk of this Court, for services rendered to parties litigant in it, the price of which are fixed and ascertained by law, and forms a part of every judgment rendered by this Court, had no proper or adequate remedy for obtaining the costs he was thus entitled to from the party who had created them; and can it be said that the legislature authorizing the clerk to issue an execution for the costs thus due him, for services rendered previous to the passage of the law, violated or impaired any right or privilege of the party from whom the costs were thus due? We think not. If it was competent for the legislature to authorize the issuance of an execution for costs afterwards created by either party, the same provisions might apply with equal authority to the costs then accrued, and that such was the intention of the legislature, cannot admit of a doubt.

But it is said the executions should be quashed, because there are more costs taxed on the person against whom the execution issued, than he had created in the cause. In most of the cases examined, such appears to be the fact; but it is considered to be only a clerical mistake, and is amend-

JULY 1829.

Anonymous.

able upon motion for that purpose; and consequently forms no ground for quashing the execution. The motion, therefore, to quash the executions, must be overruled. But the costs on all the executions must be retaxed, charging each party with the costs which he or they have created; and for the purpose of ascertaining the amount, suppose A, to be the plaintiff in error, and B the defendant: A succeeds, and B is unable to pay the costs; the costs then created by A include all except the appearance of B, and such acts as are done at his instance. Should B succeed, and A be unable to pay the costs, the same rule must be observed.

---

LECATT V. STRANG.

A bill of exceptions signed by the Judge who presided below was presented; but the certified record containing one, which the Judge stated to be the true one, none other can be received.

THIS was a writ of error from Mobile Circuit Court.

By JUDGE SAFFOLD. In this case a motion was made by the appellant's counsel to have a bill of exceptions presented by him, containing the signature of the Honorable A. Crenshaw, received as a part of the record.

On an inspection of the transcript of the record as certified by the clerk, another and different bill of exceptions appears to have been allowed on the trial by the same judge; and who now informs this Court that the bill of exceptions included in the transcript, is the only one allowed by him; and that the one now offered to the Court, was unadvisedly signed without having been read, and was never delivered, but was surreptitiously obtained from him.

It is therefore the unanimous opinion of the Court that the motion be disallowed, and that the plaintiffs attorney can either assign errors on the exceptions as presented by the transcript, or disregard them.

JULY 1839.  


## THE STATE V. ADAMS.

1. A sheriff, under the act of 1819, has no authority to give a casting vote between two candidates for sheriff.
2. Such a power not being expressly given, cannot be allowed by implication.
3. Where two candidates for sheriff obtain an equality of votes, no election is effected.
4. In such case a vacancy exists, such as may be filled by executive appointment till the next general election.
5. A citizen may by accepting a beneficial public office, waive a constitutional franchise; so an act providing that a public officer shall vote only in a certain event, is not unconstitutional.
6. The original election returns are admissible evidence to prove the true number of votes given, although they had been for some days in an exposed situation, and altered in some respects, their fairness and alteration being matters for investigation by the jury.
7. Courts of justice cannot inquire into the reasons of the executive for making an appointment to fill a vacancy, when the right exists. Therefore, petitions made to the Executive, shewing the motive for the appointment, are not legal evidence to impeach the officer's right.

This was an information in the nature of a *quo warranto*, filed in the Circuit Court of Marengo county, at the May term, 1829, on the relation of John E. Anderson.

The information alleged, that James H. Adams for the space of nine months and more, had used and still used without authority, the office of sheriff of Marengo county, which office and the privileges and immunities thereof he usurped &c; wherefore he was required to answer to the State by what warrant he claimed to use and exercise said office, &c.

The defendant appeared and filed his answer, alleging, "that at the general election held for Marengo county on the first monday in August 1828, the relator, John E. Anderson, one Henry Chiles and Thomas Adams, were candidates before the people for the office of sheriff; that Anderson and Chiles received an equal number of votes for said office, and more than Thomas Adams; that on computing the votes from the different precincts, a mistake was made in the number of votes given for Anderson; that under the influence of said mistake, the late sheriff proclaimed Anderson duly elected; that on the Saturday after the election, the mistake was discovered, and the sheriff then re-examined the returns and found that Anderson and Chiles had each received an equal number of votes, when the sheriff gave his casting vote in



JULY 1828.

The State  
v.  
Adams.

favor of Anderson, and forwarded his certificate of the result, to the secretary of State, as follows: "I Benjamin Barton, sheriff of the county of Marengo, do hereby certify, that at an election held on the first Monday of August instant, for the purpose of electing a sheriff &c. The votes being equal for John E. Anderson and Henry Chiles, I, myself have given the casting vote to John E. Anderson, in consequence of which he is duly elected sheriff of Marengo county, &c. Given under my hand and seal, at office, the 18th August 1828.

(signed,) B. BARTON, sheriff. [SEAL.]"

The defendant further alleged, that Anderson did not receive a majority or plurality of votes at the election, but only an equal number to that received by Chiles, whereby, in consequence of the expiration of the commission of B. Barton, the office became vacant and subject to be filled by appointment by the Governor; that there had been no election held since. He further alleged that on the 25th of September 1828, the Governor issued his commission under the great seal, appointing him, James H. Adams, sheriff of Marengo county, which commission he produced, and which is as follows:

"The State of Alabama, and by the authority of the same. John Murphy Governor of said State to James H. Adams, greeting. Whereas the election of sheriff of Marengo county held on the first Monday in August last has been contested, of which due notice has been given to the executive department: Now therefore, in pursuance of the power vested in me, and in order to provide in this contingency for the demands of the public service, I do by virtue of the power and authority in me vested, hereby commission you sheriff of the county of Marengo as aforesaid, to hold the said office until superseded by the determination of the contested election, or otherwise by the constitution and laws of the State: You are hereby therefore authorized and required to do and perform all and singular the duties incumbent on you as sheriff of Marengo county, according to law, and the trust reposed in you. Given under my hand and seal of the State, at the town of Tuscaloosa, this 25th day of September in the year 1828, and of the Independence of the United States the fifty third.

(L. S.)

(signed,)

JOHN MURPHY.

By the Governor,

JAMES I. THORNTON, *Secretary of State.*"

JULY 1829.  
The State  
v.  
Adams.

---

Under this commission the defendant alleged that he was duly qualified, had given bond, had taken on himself and continued to discharge the duties of the office."

The solicitor and counsel for the relator demurred to this plea, and the demurrer was by the Court overruled. A general replication was then filed, and issue joined, and at the same term, a verdict was found for the defendant; on which judgment was rendered for him.

By a bill of exceptions taken by the relator at the trial, it appears that the relator requested the Court to instruct the jury, that if they believed from the evidence that Anderson and Chiles had an equal number of votes, and the sheriff had given the casting vote to Anderson, he had a right to do so, and that thereby Anderson was duly elected. This charge the Court refused, and instructed them that the sheriff had no right to give the casting vote in an election for sheriff, and that if there was a tie between the candidates, there was no election.

The relator offered to prove that there had been a notice given to Anderson to contest his election, which contest had not been prosecuted, but relinquished, and that a petition had shortly after the election been presented to the Governor, soliciting the appointment of Mr Adams, for particular reasons and particular purposes. This evidence the relator's counsel offered as an explanation, and as containing as it was said, a full reason why the commission issued to Adams. This evidence, on the objection of the defendant, was rejected by the Court.

The defendant offered in evidence the certificates of the votes given at the different precincts, to prove that a tie actually existed between Chiles and Anderson. It was proved that the certificates had been received, and that a count was made thereon on Tuesday, the day after the election, on which the sheriff had declared Anderson elected by five votes over Chiles, and that then the papers were left open and subject to public inspection, and were frequently inspected, and in fact that one of the returns had been altered so as to make the votes of Turkey-creek precinct read and be in figures, eleven for Chiles, when it should have been nine. The relators counsel objected to the introduction of said certificates, for any purpose whatever; but the Court overruled the objection and permitted them to be read, and instructed the jury to give them what weight they might think them entitled to as the *data* on which the count was made on Tuesday and Saturday.

JULY 1829.

The State  
v.  
Adams.

---

The relator's counsel requested the Court to instruct the jury, that as the returns from the different precincts in the county were directly from the hands of the managers of the election on Tuesday, when they were first counted out, and not liable to be altered, they afforded better evidence of the true state of the votes than they could on Saturday when they were counted the second time, and that this was a conclusion of law and not a matter of inference. This charge the Court declined to give. They further requested the Court to instruct the jury, that the sheriff had a right to give his vote as a citizen, even after the polls were closed, which was also refused.

The relator in this Court assigns for error, the overruling of the demurrer to the defendant's plea, and also the several decisions made as shewn by the bill of exceptions.

SHORTRIDGE, for the State.

LYON and KELLY, for the appellee.

GAYLE, for the appellant, in conclusion.

By JUDGE TAYLOR. It is insisted for the relator. 1st, that he was legally elected, and is entitled to the office; 2d, but if he was not, that there was no vacancy in the office which authorized an executive appointment; and therefore, the defendant is not authorized to discharge the duties of the office. 3. But if the Court should not come to either of these conclusions, that the judgment must be reversed and remanded, because the Court below erred in rejecting the evidence offered by the relator, and receiving that to which he objected. I will reverse the order in which these points were discussed in the argument, and consider the third point in the first instance.

The relator, on the trial of the case in the Circuit Court, offered in evidence some papers purporting to be representations to the Governor in the form of petitions of many of the citizens of Marengo, by which he was induced to commission Adams, with a view to show, as he alleged, that fraud was practised upon the Governor in procuring from him the commission; which were excluded. That the judiciary should inquire into the inducements which operated upon a co-ordinate branch of the government in making an appointment which is confided to its discretion, would indeed be a delicate and unenviable duty. It would be declaring that the courts were

JULY 1829.

The State  
v.  
Adams.

---

more competent to determine upon the qualifications of citizens for office, or at any rate, that they were more deliberate in investigating those qualifications than the executive, to whom the law has confided the appointment. But in what manner, and at what time, is such an investigation to be made? Is it to be done upon the request of the Governor? and are we to wait until such request is made? Or is any person who conceives himself either wiser, or more anxious for the pulic good than the chief officer of State, to give the information to the Courts? And if we are to inquire into the manner in which the Governor has made an appointment, what hinders us from also looking into elections made by the people, and excluding men from the offices to which they have been elected, because we believe such election was secured by fraudulent practices? This doctrine is fraught with consequences of a nature too plainly intolerable to be entertained for a moment. The Court was therefore right in rejecting the testimony offered by the counsel for the relator, as specified in the record. It was equally so in receiving the returns from the precincts made to the sheriff. These returns form the *data* upon which the sheriff is to arrive at the result of the election. They are evidence to him of the number of votes given in at each precinct, and for whom. If they had been locked up when received by the sheriff, and never inspected or seen by any other person, they would certainly have formed a part of the evidence to be submitted to the jury in trying the question of right to the office. As it is from these returns that the sheriff ascertains the result, it is conceived they are admissible before the jury, to shew that he was authorized to draw such a conclusion from the premises before him. It is true they would be far from conclusive, but liable to countervailing testimony, going to show error from mistake or design. Does then the circumstance of those returns having remained open to public inspection, and an alteration having been made in one of them, render them incompetent? It seems to me this question answers itself. These facts, with respect to them, are to be ascertained, and if so, must they not be before the Court, before such inquiry can be made? Such circumstances are to be weighed by the jury in determining what credit they will give to the returns, but cannot affect their competency.

As to the second point, it is believed this case is in substance one between the relator, Anderson, and the defen-

JULY 1839.

The State  
v.  
Adams.

---

dant, Adams; that it is the true interest of the State that every citizen should have his rights, and therefore, the State will lend its name to a citizen to assert those rights, when they affect his title to a public office of which another is in the enjoyment. But this Court does not believe that either law or policy requires that one man in the occupancy of an office shall be put out upon the complaint of a stranger. It is good policy that offices shall be filled, particularly so important an office as that of sheriff, not that they should be vacant. Therefore, if the relator has not right to the office, the inquiry is terminated. But, as that branch of the subject is more immediately connected with this part of the investigation than any other, I will proceed now to inquire whether, if it be admitted the relator was not elected, there existed such a vacancy in the office as authorized the Governor to appoint? The words of the Constitution, relating to the subject, are to be found in the Laws of Alabama, page 924, section 24, and are as follows, viz: "A sheriff shall be elected in each county by the qualified electors thereof, who shall hold his office for the term of three years, unless sooner removed, and who shall not be eligible to serve, either as principal or deputy, for the three succeeding years. Should a vacancy occur subsequent to an election, it shall be filled by the Governor, as in other cases; and the person so appointed shall continue in office until the next general election, when such vacancy shall be filled by the qualified electors; and the sheriff then elected, shall continue in office for three years." This section provides that elections for this office shall regularly take place; therefore, it would be a strained and forced presumption to suppose that there would be no election held, as that would be directly in the teeth of the provision. The whole object of the section is to secure the means by which the offices of this description throughout the State shall be filled, and the terms for which they shall be held. The convention had their eye fixed upon the object of keeping the office always occupied. They determine that public policy requires that these officers shall be elected by the people, and that the same persons shall only retain the office for three years. It is easy to provide that elections shall be held at stated periods, and it is as easy to determine that the individual shall only continue in office three years; but the convention would make no provision by which the office would be at all times filled by the people. There might be vacancies, and as it would require time to fill

JULY 1899.

The State  
v.  
Adams.

---

such vacancies by the people, it is necessary that the duties of the office shall be discharged in the mean time. The convention thought it wiser that the election by the people should be postponed until the next general election for members of the General Assembly, &c. than that they should be specially convened for that particular purpose, and that in the mean time the Governor should make an appointment. The convention, therefore, intended to provide for filling the office by an election in the first instance, and a vacancy by executive appointment when it occurred. They took it for granted elections would always be held in conformity with the provisions of the constitution, and they proceeded to provide a mode of appointment, in the event of the election by the people not effecting the object of providing a sheriff for the next three years; that is, in case the office should be vacant from any cause, after such election was held. The words of the constitution are, "should a vacancy occur subsequent to an election," &c. clearly meaning, should a vacancy occur subsequent to the time prescribed by law at which a sheriff is to be elected, not to the time when a sheriff is actually elected. This construction, and no other, completely fulfils the intention of the constitution in keeping an incumbent always in the office. The former sheriff holds his office until the next election has terminated; and there can never be a vacancy for a longer time than it would require to apprise the Governor that it is necessary to fill it. When the time fixed by law for the general election arrives, the people meet at the polls and give in their votes, should they fail to elect a sheriff by being divided as to their choice, the general election terminates, and a vacancy in the office of sheriff takes place; it is "subsequent to an election." There was no vacancy before, as the former sheriff continues in office until that time. There is one now, because no election is effected, and it is within the authority of the Governor to fill it.

But it is argued that, in this instance, the commission shows that the Governor did not intend to make an appointment but for a limited period, viz: until the contest was decided, and the contest being abandoned, the defendant is no longer authorized to act in the office. It was clearly the intention of the Governor to appoint the defendant for the whole time that the office would have been vacant without such appointment, and the manner in which he has expressed such intention is not material.

JULY 1829.

The State  
v.  
Adams.

---

The main inquiry now arises, was the relator elected sheriff of Marengo county at the general election? As there is a difference of opinion among the members of the Court on this subject, and as it is of great importance to the parties, I shall consider it with some minuteness, and endeavor to give with plainness the reasons which operate upon my mind in bringing me to the conclusion to which I have arrived, and which is the result of my best judgment and most mature reflection. To determine this question, it is only necessary to ascertain whether the sheriff, Barton, was authorized to give the casting vote to the relator, the people having given an equal number of votes to him and to Chiles. For I consider it incontrovertible, that if he had that power immediately at the close of the election, he had it whenever he learned for the first time that it was necessary to use it, provided he exercised it in a reasonable time after receiving such information.

It is contended that the sheriff, Barton, had no power to give the casting vote, for two reasons. 1st. because there is no statute authorizing him to do so. 2. If there is, such statute is unconstitutional. I will examine the last reason first.

The constitution, article 3, section 5, declares, "every white male person of the age of twenty-one years or upwards, who shall be a citizen of the United States, and shall have resided in this State one year next preceding an election, and the last three months within the county, city, or town, in which he offers to vote, shall be deemed a qualified elector." It is insisted in argument that every citizen of the description contained in this section, has a right to vote; that sheriffs, as well as others, are included; and that to prohibit their voting, except in a particular event, is depriving them of this constitutional privilege.

That this objection is specious, is certain, but I do not think it will bear the test of scrutiny. Constitutions are always intended to lay down general principles, to define boundaries by which the different departments of the government are to be limited, and to secure the great rights and privileges of the people; such at least, are the objects of our federal and state constitutions. These great principles, thus declared, are to be acted upon by the different departments of the government, and some of them to be brought into active operation by the aid of subsequent en-

JULY 1829.

The State  
v.  
Adams.

---

actments of the legislative department. Constitutions are intended to be of a permanent nature, liable to amendment it is true, yet guarded against the hand which would rashly and inconsiderately make alterations in their provisions. It is obvious then, that a constitution must be liberally construed, with the view of effectuating the intention of its framers; and that the history of the times in which it was framed, the manner most efficient in securing its objects, the restraints intended to be imposed and the privileges intended to be granted, must all be taken into consideration in giving a construction to those instruments. What then was the privilege intended to be secured by the 5th section of the 3d article? Certainly the right of suffrage to all the persons included within its provisions; and it is equally certain that no department of the government, nor all of them combined, have the power to divest an individual of this right, otherwise than as is prescribed by the constitution. Any citizen however, is authorized to refuse to exercise this privilege. He may do it in various ways; as by refusing to vote at an election, voting for only one officer when he might have voted for five or six, absenting himself from an election, &c. The right of suffrage then, is a privilege granted by the constitution to the citizen, intended to secure his own rights. But if the citizen can refuse to exercise this privilege, he may also relinquish it for a time, to secure to himself a greater advantage. This may be tested by other provisions of the constitution. The 10th section of the declaration of rights declares, that "the accused has a right, in all prosecutions by indictment or information, to a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed." This has always been considered as securing a privilege to the accused, and that he might, under the statute authorizing a change of venue, relinquish this right, and be tried elsewhere. So, if the General Assembly declares that no sheriff shall vote at an election, except in case of a tie, it deprives no man of his privilege; for no man is bound to become a sheriff, but if he does become one, he, for the time, relinquishes his right of suffrage, to be exercised only in the, excepted case, for which he receives a greater good. He does this too, with the view in part of securing an election, the very object intended to be effected by this provision of the constitution. It is the policy of the constitution that an election should be made by the people, and therefore, an act of the



JULY 1839.

The State  
v.  
Adams.

---

General Assembly tending to advance this object, would be consonant with the best public policy. Nor does the idea that the sheriff may be authorized to give a casting vote, militate at all against the opinion herein before advanced, that a failure to elect such officer occasions a vacancy in the office. If such provision existed, the election would not have closed until the sheriff had ascertained the tie, and given his vote.

The position, that an officer may be compelled to relinquish a part of his constitutional privileges as a citizen to promote the convenience of the community, was well sustained by the counsel for the relator, in the cases put of clerks, &c. &c. being required to keep their offices at the several places of holding the courts of the different counties, which necessarily compels them to live there; and to be compelled to reside at a particular place, is as certainly an unconstitutional restriction upon citizens generally, as any which can be imagined. Offices are created, and officers appointed for the convenience and advantage of the people, and so long as these objects are kept in view in legislative enactments with regard to them, their rights are not infringed. The constitutions of all the States prescribe the general qualifications of electors; in several, the sheriff is required by statute to give the casting vote; and in none, so far as I am informed, has the constitutionality of such a law been questioned. I am therefore of opinion that such a statute would not be unconstitutional.

I come now to examine whether such a statute does actually exist in our statute book.

To prove that there does, much has been advanced in argument, which would have been sound logic if addressed to the legislative branch of the government, but which ought not to influence this Court in arriving at a conclusion. That such a law would be politic, will not be disputed by me; but because I am of this opinion, it does not follow that others must agree with me, far less that I am for this reason to determine that there is such a law. It has been urged that the constitution secures the right to the electors of each county, to elect members to the General Assembly, sheriffs, and clerks; and that unless some person in the county is authorized to give a casting vote in the event of a tie, there would be a failure to elect, and the office must remain vacant; or the Governor may appoint some individual to fill the vacancy, however obnoxious such appointment might be to the people of the

JULY 1820.

The State  
v.  
Adams.

county. Receive this argument in all its latitude, and it defeats itself; for it has not yet been contended by any, that the constitution gives to any person a casting vote to produce a preponderance, when an equal vote has been given to two candidates; but all admit, that if such a power exists, it is conferred alone by the act of 1812, and that of 1819, which recognizes it; for as to the provision in the 7th section of the schedule to the constitution, all agree that it was only intended to provide for the first election under the constitution, and this object being effected, it became a dead letter. Suppose the act of 1812 had been expressly repealed by that of 1819, so far as related to the casting vote of the sheriff, who then would have given such vote? Certainly any other citizen would have been equally authorized to do so, with the sheriff. The answer is plain, none would have had such authority; a vacancy would have occurred, not so destructive to the true interests of the people as might be apprehended, as it could at once be filled by the Governor of their choice; and after the revolution of a few months, the electors of the county would again meet at the polls, either to confirm the appointment made by their Chief Magistrate, by electing the man commissioned by him, or to put some person in his place, in whom they more implicitly confided.

The decision of this case then, turns simply upon this point, does the act of 1819 vest in the sheriff the power of giving the casting vote, in the event of an equal number of votes being given to two persons, candidates for the office of sheriff? The 3d section of that act, which is entitled "an act to regulate elections," &c. declares, "that hereafter the court house shall be the place of holding general elections in each and every county throughout this State, for the purpose of electing Governor, members to Congress, members of the General Assembly, sheriffs, and clerks. The election at the court house, as aforesaid, shall be holden on the first Monday, and day following, in August, in each and every year." The 3d section provides, "that the elections aforesaid shall be conducted by the sheriff and managers appointed, in the same manner as heretofore by law directed." In order to ascertain the manner in which elections were conducted before the passage of that act, it is necessary to recur to the act of 1812, passed by the Legislature of the Mississippi Territory, entitled "an act to amend and reduce into one the several acts regulating elections." The 5th section of

JULY 1820.

The State  
v.  
Adams.

---

this act, after specifying the manner in which votes shall be given in, viz: by ballot, &c. proceeds thus: "But when two persons shall have an equal number of votes, the returning officer shall have the casting vote, but shall not vote in any other case whatsoever." At that time, members of the House of Representatives were the only officers elected by the people. Does this provision, for deciding in the event of a tie, form a part of the "manner of conducting the election?" If it does, then the relator was duly elected; if it does not, he was not. There is certainly a great distinction between the manner of conducting an election, and the election itself. By "the manner of conducting the election," I understand the formal part of the election, viz: the mode of voting, the mode of receiving and registering the votes, of computing them, &c. The word *manner* has never been considered as including substance, but form only, and the word *conducting*, certainly cannot be synonymous with *effecting*. Now the giving a casting vote is clearly not a part of the "manner of conducting," but it is effecting the election. The qualifications of the electors is substance, the manner of determining upon those qualifications is form. Under the provision which we are considering, it devolved upon the managers to determine whether the voters possessed the necessary qualifications to vote; but the law must definitely prescribe those qualifications. In the event of a tie, the giving of the casting vote is as substantial a part of the election, and more so if possible, than the qualifications of the electors. It is so far from being the manner of conducting the election, that it is absolutely making the election. When the polls are closed, and the votes are counted out, the sheriff and managers have completed their duty as respects the manner of conducting the election, and if no election of any officer is effected by reason of a tie, and any individual is authorized then to vote, he is as completely the elector, as if no other person had been permitted to vote at all. This is placing in the hands of the sheriff, a great and important privilege, too important, I conceive, to be given by mere implication, unless it was necessary to the security of some great interest. I believe therefore, that the power of the sheriff to give such vote, ought not, and legally cannot, be extended by implication; and that therefore, he has not the power to give the casting vote, except in the instance expressly provided for, viz: in the event of a tie between candidates for the House of

Representatives; and that the argument *ab inconvenienti* cannot in this instance, be permitted to weigh with the Court.

JULY 1839.

The State  
v.  
Adams.

The practice of extending statutes far beyond their legitimate meaning, indeed of often giving them a construction directly in opposition to the plain intention of those who made them, has been in many instances carried to a most unwarranted length. That statutes, which have in view the remedy of a particular mischief, should be construed by the Courts so as to carry that intention into effect, is, in the general, a plain proposition; but when the formal mode prescribed for carrying into execution the provisions of one statute, is recognized and prescribed as the mode of carrying into execution the provisions of another, to determine that all the substantial enactments of the first are included in the last, might produce much confusion; nor can I perceive the necessity for these extended constructions. Did our General Assembly meet but once in some dozen years, the argument *ab inconvenienti* would possess great force indeed; but when there are annual sessions, surely it is safe and more becoming in the judicial tribunals to suggest to this more immediate organ of the people, the amendment which they consider politic, than to make it themselves.

I consider the policy upon which our happy institutions are based, of keeping separate and distinct the three departments of the government, as the one best calculated to secure the permanence of our liberties; and while I would watchfully guard against the encroachments of the executive or legislative departments upon the independence of the judicial, I would be equally vigilant not to pass the boundary laid down for me as a judge. While all shall act in this way, we shall move on harmoniously, and the great object of the constitution, the security of the people's rights, will be perfectly effected.

I consider it unnecessary to dwell upon the consequences produced by the announcement made by the sheriff, Barton, that the relator was duly elected. This can have no possible effect. If he had received a minority of votes, this declaration could not make him a sheriff, either *de facto* or *de jure*; if he had received a majority, he was entitled to the office whether declared so or not.

I am of opinion the judgment should be affirmed, and of this opinion are a majority of the Court.

JULY 1829.

The State  
v.  
Adams.

---

By JUDGE LIPSCOMB. I have not formed an opinion on the point whether the act of 1812 was abrogated or not, by the constitution; but I most fully concur in the construction given to that act in the above opinion.

By JUDGE SAFFOLD. An election was held at the time appointed, when Barton, the sheriff then in office, computed the votes, and proclaimed the relator elected by a majority of five votes; five days afterwards, on suggestion of a mistake, he re-examined the certificates returned by the managers, from the different precincts; the result of which was, that Anderson and H. Chiles had received an equal number of votes; whereupon the sheriff gave the casting vote in favor of the relator, and made out and forwarded to the department of State a certificate thereof. An attempt having been made to contest the election of Anderson, and notice thereof given to the executive department, the Governor proceeded to fill the office, and commissioned the defendant, Adams, "to hold the said office until superseded by the determination of the contested election, or otherwise by the constitution and laws of the State." No method for contesting elections for sheriff having been prescribed by statute, nothing farther appears to have been done in the contest until it was renewed in this judicial form. The contest appears to have been attempted in the first instance, and the executive appointment to have been made on the supposition that Barton, the returning officer, had no right to give the casting vote; or if he had, it was not done in time. These points involve all the difficulty of the case.

The right of the returning officer to give the casting vote in the event of a tie in the election of sheriffs, is denied, on the ground that the act of 1812, under which, as modified and extended, the authority is claimed, does not apply to elections for sheriff. It is true this act of the Territorial Legislature was passed with exclusive reference to elections for Representatives to the General Assembly, and at that time no other State or county officer was elective by the people; hence the expressions of the act embrace Representatives only. I think there can be no difficulty in deciding, that unless the application of the act of 1812 has been extended by subsequent legislation, no change in the form of the government, or extension of the right of suffrage, would confer the right of giving the casting vote in the election of other officers.

JULY 1839.

The State  
v.  
Adams.

---

But I maintain that the constitution and statutes of the State have given the same right in the election of all county officers in which the sheriff is the returning officer. The fact that a different regulation exists in the election for Governor, can furnish no argument against the right in the other elections mentioned, for in this, various considerations prove that the General Assembly is the only competent authority to act. In the event of an equal division of votes in the election of Representatives to Congress, the several returning officers of the district shall determine which of the candidates shall be the Representative. <sup>a</sup> This may be regarded as one of the many indications of the policy of the State, to maintain inviolable the right of suffrage, by confining the election and ultimate choice of all officers to the electors of the district or county entitled to the franchise. The right of the returning officer to give the casting vote for sheriff, may, I conceive, be fairly derived from the statutes of 1812, regulating elections for Representatives to the General Assembly, conjointly with the 7th section of the schedule to the constitution, and the act of 1819. <sup>b</sup> The schedule directs, that the first election for Governor, Representatives to Congress, members of the General Assembly, clerks of the several Courts, and sheriffs of the several counties, "shall be conducted in the manner prescribed by the existing election laws of the Alabama Territory." Had there been a tie in the election first held under the constitution, for any State Senator, can a reasonable doubt be entertained as to the authority of the returning officer to have given the casting vote? All admit he had this right in an election for Representative, for the act of 1812 had expressly so directed; the constitution had continued in force all the Territorial laws not repugnant to it, and had further declared as above recited, that the election for members of the General Assembly, and all the other officers mentioned, should be conducted in the manner prescribed by the existing election laws of the Alabama Territory. What more could have been necessary to place the conduct or entire management of the elections of Senators and Representatives on the same footing? My present object is to prove that members to both branches of the Legislature must be elected in the same way, and that it is impossible that a difference can exist between the election of Senator and sheriff, as respects the right of the returning officer to give the casting vote.

<sup>a</sup> Laws of  
Ala. 284.

<sup>b</sup> Laws of  
Ala. 274.

JULY 1829.

The State  
v.  
Adams.

While I admit Courts have no authority, in order to carry into effect their own notions of expediency, to extend the operation of statutes, by construction, to persons or things not within their legitimate meaning, though they be equally within their reason, I am equally zealous to maintain, that we should not torture language or pervert its usual acceptation, to produce difficulty or inconvenience, or to search for a *casus omissus* in legislation; but that we are bound to interpret all statutes according to their true intent and meaning, and such as are of a remedial nature, liberally and beneficially. Then when it is declared that the elections authorized by the constitution shall be conducted in the manner prescribed by the then existing laws of the Alabama Territory, I can understand the language in no other sense, than that such elections are not only to be commenced, but finally consummated by the same rules; nor can I conceive, while two or more candidates have an equal number of votes, that the election has been completed. It is true the authority derived from the constitution as referred to, had exclusive reference to the first elections to be held under it; but the Legislature was equally competent to legislate on the subject, and at the succeeding session, shortly after the first elections, an act was passed to regulate the elections of the several officers before mentioned, by which it is provided that the elections aforesaid, "shall be conducted by the sheriff and managers appointed in the same manner as heretofore by law directed."<sup>a</sup> This language is substantially the same as that employed by the constitution, and must evidently refer, as there was no other, to the election law of 1812, which authorized the returning officer to give the casting vote.

<sup>a</sup> Laws of  
Ala. 274.

Neither Senators nor clerks of either Court, more than sheriffs, were elected by the people in 1812. The government being territorial, had no Senators, and the clerks and sheriffs were appointed by the Executive. Hence it appears to me impossible that the election of either of these officers, or of Representatives, can be governed by rules different from the others. The Legislature, as well as the Convention, has arranged them in the same class for election, and explicitly declared that it shall be conducted in the same manner prescribed by the pre-existing election laws. Under the different construction, if a tie occur in the election of a Senator, there is no authority competent to determine the election. The Senate

JULY 1890.

The State  
v.  
Adams.]

alone, has a constitutional right, when convened, to judge of the election, and return; till then nothing can be done, and the Senate have no power to give the casting vote, nor has the Governor that power, or any authority to fill the appointment, and the consequence of their declaring a vacancy and ordering a new election would be, that the county would remain unrepresented during the greater part, or all the session. Similar inconvenience would result from the same cause in reference to sheriffs, unless a tie *ipso facto* constitutes a vacancy subject to executive or judicial appointment, and this according to our polity would be a most novel idea. And though a commission has issued to Adams, who was not a candidate, the Governor has not viewed the difficulty in this case, in the light of an ordinary vacancy; he expresses in the commission as the cause of making the appointment, that the election had been contested; nor has any authority been discovered for an executive appointment in cases of contested elections. These are cases in which I conceive both law and usage have directed that the person ostensibly elected, and having the certificate of the returning officer, shall exercise the office until the contest be terminated in favor of one of the parties, or until the tribunal authorized to try and determine the contest shall declare the office vacant: and if the law, as in this case, has provided no other mode of deciding the contest, the judiciary is always competent. The official acts of the person in office under color of right, during the pendency of the contest, are valid as the acts of an officer *de facto*, if not *de jure*. The direction of the constitution on this head is, that if a vacancy occur in the office of sheriff subsequent to an election, it shall be filled by the Governor, as in other cases, until the next general election. Shortly after this election was held, and the difficulty had arisen as described, the Governor commissioned Adams, who otherwise had no claim to the office. At a later period, ascertaining there was no prospect of a speedy decision of the contest, he issued a commission to Anderson pursuant to his certificate of election; but Adams refusing to yield his authority, continued to exercise the functions. It is conceded that a commission does not confer the right to an elective office, except in case of vacancy, as directed by the constitution, and that it is only evidence of the right, which may be resisted, and either sustained or annulled, according to the true result of the election.



JULY 1839.

The State  
v.  
Adams.

---

Then, as it is not conceived that any such vacancy existed as is contemplated by the constitution, and inasmuch as the sheriff had certified that Anderson was duly elected, I find it necessary to express an opinion that the commission to Adams was unauthorized, and that on a full view of the merits, that said relator was legally and constitutionally elected; that such is the only legitimate conclusion, whether it be considered that he had a majority of five votes, as first calculated, or that the number of votes was equal for him and another, as supposed on the second examination of the certificates, five days afterwards, and that the sheriff then gave him the casting vote. As the delay in determining the election was produced by a mistake, rendering the casting vote unnecessary, and the law does not limit the time, it cannot affect the relator's title to the office.

It has also been contended in favor of the defendant, that the provision in the election law authorizing sheriffs to give the casting vote, and denying them the right to vote in any other case, is unconstitutional, for the reason that it affects their right of suffrage. This objection will be but slightly noticed, as it is not sustained by the opinion of a majority of this Court.

Besides the reasons already advanced to prove that the right to give the casting vote is consistent with both the law and constitution, it may be also observed, that other privileges intended to be secured by the constitution, and which are deemed inestimable, cannot be insured without the existence of this right. The constitution guarantees to the electors of each county, the right to elect members to the General Assembly, sheriffs, clerks, &c. Then, the effect of a denial of authority to some one in the county to give the casting vote in the event of a tie is, that the county must remain for a time without any such officer, or that the Governor, residing in a distant part of the State, may control the result according to his will, by appointing whom he pleases, however offensive to the county; and true as it is, that this state of things may not often occur, yet every election is subject to it, and the principle is the same as if the occurrence was more frequent. And it is also important to reflect, as insisted by the relator's counsel, that if it be admitted that the mere act of contesting an election creates a vacancy, the inevitable consequence is, that any designing individual, by merely exhibiting the form of a contest, may deprive the electors of the county of their constitutional right of suf-

JULY 1829.

The State  
v.  
Adams.

---

frage and defeat their will, however united in any case, by transferring the appointment to the Governor, and this may be repeated as often as elections shall be held. A more palpable invasion of the elective franchise cannot be well imagined; and the principle being established on constitutional grounds, the remedy would be placed beyond the control of the Legislature.

This would be a state of things than which nothing could be more foreign from the intention of the Convention. And to all the objections urged on the ground that the individual rights of the returning officer would be withheld, by denying him the common right of suffrage, I think a sufficient answer has been given by the relator's counsel, that it is an usual and necessary incident to the office which the incumbent has voluntarily accepted; that the sheriff cheerfully submitted to this qualification of the right, has duly exercised it, and that it neither did or could affect the franchise of any other person. It may be also observed that the official situation of a sheriff gives him extraordinary influence in elections; his right of suffrage is secured whenever his vote can give to the candidate of his choice a plurality; and then he has the peculiar right of voting with a knowledge of the state of the polls, whereby he may secure his first, second, or other choice. These advantages would appear to compensate for any rights yielded. These are all the points which I think necessarily involved in the contest; and according to my view of the question, Anderson was, and is entitled to the office. Hence my dissent from the opinion of a majority of the Court.

JUDGE PERRY also dissented, and concurred in the opinion delivered by JUDGE SAFFOLD.

Judgment affirmed.

JUDGE COLLIER, presided below, and did not sit.

---

#### STEBBINS V. SUTTON.

When parties have agreed that the deposition of a witness shall be taken and read on the trial, it must be read, although it appear by the deposition the witness was interested.

On the trial of an action of assumpsit in the Circuit Court of Baldwin county, Pell B. Sutton recovered against

JULY 1899.

Stebbins  
v.  
Sutton.

Russell Stebbins, a judgment on a verdict for \$1,000. The declaration was for goods sold, materials furnished towards the building of a steamboat, &c. The plea was the general issue. A bill of exceptions was taken by Stebbins, the matter of which is here assigned for error.

It appears by the record, that there had been a previous trial of the cause, in which one John Motley had been examined as a witness, that a new trial had been granted, and that at the same term the following entry was made of record, viz: "In this cause it is agreed that the deposition of John Motley, a witness for plaintiff, shall be taken this day before O. Sibley, clerk of this Court, without notice, and who it is agreed shall be considered as authorized to administer an oath to the witness, and that said deposition shall be read in evidence upon the trial of this cause." Under this agreement, the deposition of Motley was taken, and was offered as evidence for the plaintiff on the second trial. It was objected to by the defendant, 1st, because by the evidence itself it appeared he was an interested witness; and 2d, because the evidence was irrelevant to the issue. The objections were overruled, and the evidence was read.

HITCHCOCK, for the plaintiff in error.

ACRE and PARSONS, for the appellee.

By JUDGE PERRY. In pursuance of the agreement, the deposition of the witness Motley was taken and read on the trial in the Court below, which was excepted to, and forms the ground of error insisted on in this Court; because as it is contended, the witness was directly interested in the event of the suit. Such interest has at all times excluded witnesses from giving testimony in Courts of justice, unless the parties by their agreement make such testimony legal. Have they done so? The strong language used in the agreement, that the deposition should be read in evidence upon the trial of the cause, is emphatic of the intention of the parties, that they intended to render the witness competent, whatever his interest might be; this construction, it is believed better protects the rights of the parties and preserves the rules of law, than any other that can be given to the agreement; because it may fairly be inferred from the record, that both parties knew what the testimony of the witness would be, previous to the agreement, as the defendant below, in an affidavit for a new

JULY 1839.

Stebbins  
v.  
Sutton.

---

trial previous to the agreement, alleged surprise in consequence of the witnesses testimony. But it is contended, that a consent to take a deposition is always to be construed subject to legal exceptions as to the competency of the witness, unless the record shews that the opposite party has expressly waived the point. The construction contended for might well be conceded, had the agreement gone no further than the mere taking of the deposition; but the parties do not stop there, they go further and say the deposition shall be read on the trial, which waives all exceptions to the deposition, unless it be true as contended in the second place by the plaintiff's counsel, that the testimony was irrelevant to the issue. Under this objection it may be necessary to consider the effect of the witnesses testimony. It then proves that the witness, while in the employ of the plaintiff in error, received goods of the defendant, which were appropriated to the plaintiff's use in the payment of his workmen; that Stebbins, in making out the bills of his workmen, charged them with the goods got from Sutton. This testimony then, created an obligation upon Stebbins to pay for the goods he had thus appropriated to his own use, and tended, to say the least of it, to prove the issue between the parties, in accordance with the rule of law that every thing which tends to prove the issue between the parties is admissible upon the trial. This last view of the case it is believed, entirely rids it of the statute of frauds. We are therefore of opinion, that the judgment of the Court below should be affirmed.

By JUDGE TAYLOR. In this case the decision must turn entirely on the construction of the agreement between the parties, relative to the deposition of the witness, Motley. That this witness was interested and incompetent is clearly proved by his own testimony, and put beyond all doubt by the written contract between him and the plaintiff in error. He was liable to Sutton unless a recovery could be effected in this action, and therefore interested in securing such recovery by his testimony.

The agreement by which it was determined by the Circuit Court that the defendant Stebbins was precluded from objecting to the competency of the testimony of Motley, was made in open Court, and it must be presumed, by the attorneys for the respective parties, as the entry is as all are which are thus made, without the signatures of the parties, and without any expression that the plaintiff and

JULY 1839.

Stebbins

V.

Sutton.

defendant appeared in their proper persons, &c. If then, this was an arrangement made between the counsel, what must have been their object? It has been contended in argument, that it was a condition upon which the new trial was granted. If so, it should have been evidenced by the record; but nothing to this effect is found there. It was a voluntary agreement gratuitously made by the counsel for the defendant. It appears to me to be a most unreasonable construction, to determine that the defendant's counsel intended that the rights of his client should be compromised, nay sacrificed by the introduction of illegal and incompetent testimony. By the law, it is necessary for a party who wishes to procure the deposition of a witness, to make oath to his materiality, sue out a dedimus, give notice of time and place to the opposite party, &c. By determining that this agreement does not contain a stipulation that the deposition should be used on the trial, whether the testimony should be legal or illegal; is this agreement nullified? Far from it, it effects much; all that an intelligent and honest attorney can be supposed even to intend to grant, without express words, showing beyond doubt that he grants more. All the pre-requisites of making the affidavit, suing out the dedimus, giving the notice, &c. are dispensed with; in addition to all which, the clerk is authorized to act as commissioner and to administer the oath to the witness. Then this agreement grants much to the plaintiff, in whose behalf this deposition was taken, which the defendant's counsel might legitimately grant, without jeopardizing the rights of his client.

It is insisted however, that the intention of the parties is made plain by its appearing in the record, that the witness had testified upon a former trial in the cause. This does not convince my mind. On that trial, his interest and consequent incompetency may not have occurred to the defendant's counsel, or if he was objected to on that ground, the objection may have been overruled.

To me it appears plain that it was only intended by this agreement to place the plaintiff, Sutton, in as good a situation as the personal presence of the witness would do at the trial, not a better. It is a common form of expression to add to the conclusion of notices for taking depositions &c. that they will be read on the trial of the cause, it is often appended to agreements made between counsel; yet I never knew it contended before, that no matter how illegal the testimony, still it was to be read,

but always understand that no objection to competency is thereby waived.

JULY 1829.

Stebbins  
v.  
Sutton.

---

It has been asked, "suppose the agreement had authorized the deposition of a party to be taken." This is no illustration. In that case the words upon which so much stress is laid in this instance could give no additional effect to the agreement. When it is agreed that a party shall give his deposition, it must be understood as conceding a right, because all know it cannot be done without such agreement; and because it will be presumed the parties had some object in view. But if counsel could be so reckless of the interest of their clients as to make such an agreement, would the Court permit it to be carried into execution, if objected to on the trial? Would not the authority of the Court be interposed when it was seen that an attorney was betraying the trust confided to him? Most certainly. Then in the present instance, I cannot agree to a construction which places counsel in such an attitude, particularly when he is known to have been a man of integrity; and even were the agreement more explicit in evidencing an intention thus to compromise the interest of a party, without its appearing that he had been consulted on the subject, I much doubt the propriety of permitting his rights to be thus sacrificed. In my opinion the judgment should be reversed, and the cause remanded.

Judgment affirmed.

The CHIEF JUSTICE presided below, and did not sit.



**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF ALABAMA.**

---

CASES DETERMINED AT THE TERM OF THE FIRST MON-  
DAY IN JANUARY, 1830, AT TUSCALOOSA.

PRESENT AT THIS TERM,  
**CHIEF JUSTICE LIPSCOMB,**  
JUDGES SAFFOLD, CRENSHAW, TAYLOR, WHITE, COLLIER AND PERRY.

---

**BRANDON V. SNOWS AND CUNNINGHAM.**

1. Between third persons, the presumption is that public officers have done their duty. Therefore a purchaser of personal property at sheriff's sale, need not prove that the sale was duly advertised, nor that it was regular. It devolves on the opposite party to show its illegality.
2. As to real estate, would such proof be necessary, *quaere?*
3. A sheriff may amend his return on an execution at any time, to make it true; and such return will relate back and protect a purchaser as if originally made.
4. The possession of property remaining with the vendor, is not *per se* fraudulent, particularly when sold at sheriff's sale.
5. The Court may lawfully sum up the evidence to the jury, and instruct them hypothetically.

THIS was a trial of the right of property in a slave, in Tuscaloosa Circuit Court. L. Brandon had recovered a judgment in said Court, against J. Wyzer; an execution issued on this judgment the 18th of April 1826, was levied on the 23d September 1826, on a negro boy named Jacob, then in the possession of Wyzer. Snows and Cunningham claimed the slave as their property; under the statute they filed their affidavit and claim, on the 2d of October 1826, and a trial of the issue joined between



JANUARY 1830.

Brandon  
v.  
Snows and  
Cunningham.

---

Brandon the plaintiff in execution and the claimants, was had at March term, 1828, when a verdict was found for the claimants.

By a bill of exceptions taken by Brandon, it appears that before the jury he proved his judgment, execution, and levy, and that the slave was in Wyzer's possession. The claimants proved the existence of an older judgment against Wyzer, in favor of one Bullock, and that an execution had issued under it, which was produced with the following return: "Levied 16th January 1824, on one house and lot, and one negro woman named Joicy.

W. Y. GLOVER. *Sheriff.*"

"Also one negro boy named Jacob, taken as the property of J. Wyzer, at the suit of J. Bullock, and the said boy was sold, the 2d of March, 1824, to Snows and Cunningham. I certify that from the word "Joicy," the other words are added by leave of the Court, this 13th of October 1827. The words "16th January, 1824," are also added by leave of the Court as an amended return.

W. Y. GLOVER."

The former sheriff Glover, deposed that he did in fact sell the negro at sheriff's sale under this execution to the claimants for \$255, which they paid him, and that he delivered him to them, and gave them a bill of sale. The bill of sale was not produced, nor was it recorded, but its loss and contents were proved. It was further proved that in a short time after the sale by the sheriff, the slave went into the possession of Wyzer, and remained in his possession two or three months, without any stipulation for loan or hire, express or implied; that after that period the claimants hired the slave to Wyzer at \$20 per year, and that this was a reasonable rate of hire; that the claimants had regularly paid the taxes for him; it was also proved that Wyzer was indebted to the claimants at the time of the sale, in a small amount. There was no proof produced of any notice or advertisement of the sale, nor that ten days notice was given, or any other time, nor was the place of sale proved. On this proof the counsel for the plaintiff in execution requested the Court to instruct the jury;

1. That it was necessary the claimants should prove that legal notice of the time and place of sale had been given according to statute; and that the sale had taken place at the appointed time and place, and in the manner required by the statute.

2. That the right of Brandon could not be prejudiced or affected by the amended return of the former sheriff,

on Bullock's execution, when those rights had accrued anterior to the making of the amendment. JANUARY 1839.

3. That the slave going into the possession of Wyzer, a short time after the sale, and remaining there two or three months without any stipulation of loan or hire, when the relation of debtor and creditor existed between them, rendered the transaction fraudulent.

Brandon  
v.  
Snows and  
Cunningham.

---

The first instruction the Court refused, and instructed the jury that they were bound to presume that the sheriff had done his duty, and that all the requirements of the law had been observed by him, unless the contrary was shewn by the opposite party. The second instruction was also refused; and the Court charged the jury that the sheriff's amendment had a retrospective effect, and related back to the original return, and had the same effect on the rights of all parties, as if the amendment formed a part of the original return. The Court also refused to give the third instruction requested.

The charge given by the Court to the jury was also excepted to on account of its form, and the language employed; these expressions having been used, "If you believe the evidence introduced by the claimants, then is the case made out for them."

Brandon, the appellant, assigns in this Court for error, the decisions made as above stated.

BARTON and STEWART, for the appellant.

CRABB and P. N. WILSON, for the appellees.

By LIPSCOMB, CHIEF JUSTICE. The plaintiff in error supposes the Circuit Judge to have erred in refusing the instruction first prayed for, and in giving the instruction he did in relation thereto. In some cases it has been holden, that when land has been sold under execution, the advertisement required by statute must be proven, and that it is an essential muniment of title to the purchaser; but this rule has never been applied to personal property; no paper evidence is necessary for the conveyance of personal property; title to real property is always supposed to be sustained by documentary evidence: perhaps this distinction sufficiently shews the reason of requiring proof that real property had been advertised, while it is not required of personal property. We think then that the charge of the Judge was right.

JANUARY 1830.

Brandon  
v.  
Snow and  
Cunningham.

We do not however decide that such proof would be absolutely necessary, even in the case of a sale of land.

The second error assigned is, that the Court charged the jury, that the amended return made by the sheriff at the trial, on the execution under which the defendants purchased, related to the time when the original return was made. If the sheriff had sold the slave levied on and neglected to make the return on the execution required by statute, such neglect surely could not operate prejudicially to the purchaser; and the sheriff, as a ministerial officer, would be so far protected, as to be permitted to amend his return so as to make it true, at any time.

The third error assigned is in relation to the possession of the property remaining with Wyzer. We believe that there was no error in refusing to give the charge prayed. There had been a great contrariety of decision on the question, whether the property remaining with the vendor after an absolute sale was fraudulent *per se*, or only a badge of fraud; but under the most rigid construction, a purchase made at sheriff's sale was an exception to the rule of the possession being fraud *per se*; and the law is now settled, that in no case, does the mere fact of possession remaining with the vendor constitute fraud, but that it is only a badge of fraud, from which the jury must draw the inference of its existence, if not rebutted or explained.

Exceptions were taken to the terms used by the Judge in his charge to the jury, such as "if they believed the evidence offered by the claimants of the property, then is their case made out." It would be impossible for this Court to say whether there was error in this charge or not, unless we were informed what testimony had been introduced by the claimants. If the record does not shew enough to satisfy this Court that the charge was erroneous, we cannot presume such error. It is certainly competent for the Judge to sum up the testimony, and nothing can be fairer, or more in the sphere of his duty, than for him to tell the jury, that if they found such facts proven, that the law was in favor or against a party plaintiff or defendant. We believe there is no error error, and that the judgment must be affirmed.

JUDGES CRENSHAW and COLLIER not sitting; the former having presided below, and the latter having been of counsel in the cause.

JANUARY 1830.

## SAYRE V. LUCAS.

A note under seal made payable to A. B. or bearer, is not transferable by delivery, so as to enable the bearer to maintain an action on it in his own name.

IN an action of debt, in Montgomery Circuit Court, W. Sayre declared against W. B. Lucas, on a specialty, relying on his title there to as bearer. Lucas cravedoyer of the instrument and demurred, on the ground that such an instrument was not transferable by delivery, so as to enable the bearer to maintain an action in his own name. The instruments set out onoyer was as follows:

"§354 20. On or before the thirtieth day of December 1825, we or either of us promise to pay Jonathan Battelle and George Wilkinson, agents of the Alabama Company, or bearer, the sum of three hundred and fifty-four dollars 20-100 for value received. Given under our hands and seals, this sixteenth day of November, in the year 1822.

W. B. LUCAS, [SEAL.]  
M. ANDREW, [SEAL.]"

The case was tried at March term 1828, when the demurrer was sustained, and judgment was rendered for the defendant, Judge WHITE presiding.

The error assigned by Sayre, the appellant in this Court is, the decision made on the demurrer.

THORINGTON and GORDON, for the appellant. The instrument was not at common law a writing obligatory, it is an instrument of modern use, and intended by the makers to pass and be negotiable without assignment. Almost every State in the Union, and our State among the rest, has declared all instruments for the payment of money, negotiable. The intention of the makers and the policy of our law should prevail, rather than the antiquated notions and rules of the common law, restraining the negotiability of choses in action, as being injurious to the poor, &c. especially as instruments of this class were not then in use."

GOLDTHWAITE argued for the appellee.

By JUDGE CRENSHAW. The only question to be decided is, whether the bearer, who is not the obligee

a 3 Burrows  
1355-1516.  
Douglass 634.  
3 Term Rep.  
177. 1 Lord  
Raymond,  
180. 1 Bur-  
rows 452, 4  
Dallas 234.  
19 Johnson  
399. 7 Cowen  
174. 3 John.  
Cases 259.  
2 Cain. 149.  
3 Kent Com.  
59. 1 Cranch  
389. 2 John.  
161. Chitty  
on Bills 64.  
3 Barn. and  
Cress 15. 10  
Com. Law  
Rep. 15. 1  
Mason 264.  
12 Mass. 447.  
1 Coke 3-a.  
4 John. 55.

JANUARY 1830.

Sayre

v.

Lucas.

named in the writing obligatory or single bill, can maintain an action in his own name, against the obligor?

On this question there has been heretofore a diversity of opinion, and it affords us some satisfaction that a case now occurs in which the practice can be settled by a legal adjudication..

*Minor's Ala.*  
Rep. 102.

I did believe that it had been settled by the decision in the case of *Howell and Smith v. Hallett*,<sup>a</sup> when this question was directly before the Court. In that case the declaration stated that the defendants, Howell and Smith, made their writing obligatory, payable to William N. Thompson or bearer, and which was transferred by delivery to the plaintiff Hallett. The judgment was reversed on the ground that the declaration concluded in assumpsit, yet some of the Judges were inclined to reverse on the ground that the bearer of a note under seal, not being the obligee or assignee, could not maintain an action in his own name against the obligor. It was then said, that by the law merchant, notes under seal were not negotiable either by indorsement or delivery, though like other choses in action, the assignment of them would be protected in equity, and would operate as a warrant of attorney to the assignee to sue at law in the name of the obligee, and recover to his own use.

If the judgment in the case of *Howell and Smith v. Hallett* was not decisive of the question now under consideration, the reasoning embraced in the opinion has a direct application, and I shall insist on its full benefit. (I lay it down then as an incontrovertible proposition, that at common law, no chose in action was assignable, so as to authorize the assignee to sue in his own name; that by the law merchant, which was incorporated into the body of the common law, bills of exchange became negotiable; and by the aid of certain English statutes, inland bills, promissory notes, and checks on banks were also made negotiable; and that those are the only contracts or choses in action which are strictly negotiable at this day in England, and on which the assignee can maintain an action in his own name. These positions are clearly illustrated in Chitty on Bills. <sup>b</sup>

<sup>b</sup> Page 4—11.

If then, writings obligatory or notes under seal are not negotiable or assignable at the common law, so as to authorize the assignee to maintain an action in his own name against the obligor, if the action be at all maintainable, it must be by virtue of our statute of 1812;<sup>c</sup> but that statute

<sup>c</sup> Laws of Ala.  
69.

authorizes them to be assigned by indorsement alone, and not by delivery; they consequently cannot be assigned in any other mode than by indorsement, so as to authorize the assignee to sue in his own name. As illustrative of this position, see 2 Bibb 83.

JANUARY 1832.

Sayre  
v.  
Lucas.

But it has been contended that a bond or note under seal, payable to bearer, will pass by delivery in the same manner as a bank note payable to bearer. And in support of this proposition, the 3d of Kent's Commentaries <sup>a</sup> is mainly relied on. And to support his doctrine, the learned commentator refers to 10th, Common Law Reports, page 16. That appears to have been the case of a Prussian bond, by which the king of Prussia declared "himself bound to every person who should for the time being be the holder of the bond." The Court determined that this bond was analogous to a bank note payable to bearer, and that the holder of it had power to give title to any person honestly acquiring it. But this decision was solely on the ground that the bond was payable directly to the holder, and also because it was proved at the trial that such bonds were negotiated like exchequer bills.

a Page 59.

To maintain the present action, much reliance has also been placed on the case of *Bullard v. Bell*,<sup>b</sup> in which Judge Story says, that "a note payable to bearer passes by mere delivery, and the holder claims merely as bearer; that the note is an original promise by the maker, to pay any person who shall become the bearer; and that a note payable to William Pitt or bearer, is a direct promise to the bearer, whether William Pitt be a real or fictitious person." To such authority as Judge Story, I bow with respectful submission; yet great men may err: Homer, the prince of poets, did sometimes nod, and Judge Story, who is generally correct, may in this instance have extended the doctrine too far. I admit that the analogy is strong, though it is not a case precisely in point. The case before that eminent lawyer was that of a bank note not under seal; and if it had been a writing obligatory or note under seal, I have very little doubt but his opinion would have been different, as the subject matter varied before him.

b 1 Mason 252.

Can it with any sort of plausibility be insisted, that a bill single or writing obligatory, the most essential and distinguishing qualities of which are sealing and delivery, possesses in this respect the same negotiable qualities, and is governed by the same rules as bank notes, which

JANUARY 1830.

Sayre  
v.  
Lucas.

pass current in the commercial world, and answer all the purposes of cash? Surely not. Sealing and delivery are not of the essence of a bank note; if you attach these properties to it, its very name and nature become changed, and it is governed by other rules. If the bond is payable to William Pitt, or bearer, we cannot presume that William Pitt is a fictitious person in an instrument which requires the solemnities of signing, sealing, and delivery, to give it validity. If William Pitt was indeed a person not in being, it would be proper to aver the fact in the declaration, before the plaintiff, as holder of the bond, would be entitled to recover.

It is said, that a writing under seal supposes an obligor, an obligee, and thing contracted for. In the case before us, who was the obligee? I answer Battelle and Wilkinson. The delivery also, which was an essential part of the transaction, was to them. How then, could there afterwards be another delivery to a subsequent holder by the same obligor? When Lucas sealed and delivered the instrument to Battelle and Wilkinson, that was a completion of the contract, and he could not become bound to any other person by a subsequent act of the obligee. There was no privity of contract between Lucas and the plaintiff; and though the instrument is payable to Battelle and Wilkinson, or bearer, this only authorized the bearer to sue in the name of Battelle and Wilkinson, and recover to his own use. A majority of the Court are for affirming the judgment.

By JUDGE TAYLOR. The single question in the case is, whether a bill single, given to A. B. or bearer, can be sued on in the name of the bearer, without having been assigned to him by A. B. It has been contended this cannot be done for several reasons:

1. Because such instruments are not negotiable, and this would give them a negotiable character.

2. Because the legal interest is vested in the payee, and it requires an assignment from the payee to the holder, to pass it out of him.

3. Because the Statute passed in December, 1812, "concerning the assignment of bonds, notes, &c." requires that such an instrument shall be assigned, to enable the holder to sue in his own name.

I do not consider it necessary to deny the first position, in order to maintain the doctrine that such an action may

JANUARY 1830.

Sayre  
v.  
Lucas.a 1 Mason  
252.

be sustained. Negotiable instruments payable to bearer, do not pass by delivery, so as to vest the holder with a legal interest in them because they are negotiable, nor are they viewed as having been negotiated by the payee; but it is because the promise or undertaking is considered as having been originally made to the holder. Judge Story, in the case of *Bullard v. Bell*<sup>a</sup> says, "a note payable to bearer is often said to be assignable by delivery, but in correct language there is no assignment in the case." It passes by mere delivery, and the holder never takes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker, to pay any person who may become the bearer of it; it is therefore payable to any and every person who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original or direct promise, moving from the maker to the bearer." And this doctrine was essential to support the decision made in that case; it was the very point on which the action turned. If the note had been considered as passing from the payee by assignment, the decision must have been different from what it was, because it would then have been necessary, under the act of Congress on that subject, for the proceedings to have shewn that Pitt, the payee, was not a citizen of the same State with the defendant; and the decision was directly the contrary. This opinion of Judge Story, it was stated in the argument, has been supported by the Supreme Court of the United States, in a case reported in 2d Peters, which book is not here. And I do not see how a different result could be arrived at; all the authorities which I have consulted, maintain the same position. Chitty on Bills, page 64, has this strong language: "A bill may be drawn payable to bearer, and in such case it will be transferable by delivery; and a bill or note payable to J. S. or bearer, is in legal effect payable to the bearer, and J. S. is a mere cypher." I consider it clear, under these authorities, except for mere description, that it would be wholly immaterial whether the name of the payee appeared in the declaration or not, and that on a count which did not aver a delivery by the payee to the holder, the note could be given in evidence.

From these authorities and reasons, I arrive at the conclusion that an instrument payable to bearer is considered as executed to the holder; that whether this instru-

\* But are they not negotiable?



JANUARY 1830.

Sayre  
v.  
Lucas.

a Page 16.

ment be a bond, note, or bill of exchange, there is no difference: that therefore the holder has the legal interest and may maintain an action in his own name. And in this opinion I consider myself directly sustained by the case of *Gorgier v. Mieville*, reported in 10th Sergeant and Lowber,<sup>a</sup> which was an action by the owner to recover the amount of a bond executed by the King of Prussia, and made payable to the holder, which had been deposited with an agent for certain purposes, who had pledged it for a debt of his own. The Court instructed the jury to find a verdict for the defendants, unless they thought the defendants knew that the bond was not the property of the person who made the pledge. It is true, that in this case it was proved that bonds of this description were sold in the market and passed by delivery from hand to hand, like exchequer bills, and the Judge compared the bond to a negotiable instrument, because such instruments passed by delivery in ordinary dealings; and I think we may fairly presume that such is the case with paper like that on which this suit is founded, though I do not consider this material to the decision.

It is clearly proved by the case last cited, that sealed instruments are not placed by the decisions on a different footing from promissory notes, so far as this question is involved. But it is insisted, that although a suit might be brought by the holder, if the bill were made payable simply to "bearer," yet when made payable to "A. B. or bearer," it cannot; that in the latter case it is evident the instrument was delivered to a different person from the one who sues, and that it would be contradicting it by a presumption, to infer that the obligation to pay was entered into with any other person.

This is a distinction, so far as authorities have been adduced, and the researches of counsel seem to have been great, never before taken. The case decided by Judge Story was exactly similar to the present. The note was payable to William Pitt or bearer; and such a distinction is excluded by the language of Chitty before quoted, when he says the payee will be considered "a mere cypher."

I think true policy, if the law will admit it without great violence, requires at our hands the same decision in this case, which we would make were the action founded on a promissory note. By our statutes they are placed in almost every instance, and for every purpose, on the same footing; they are the kind of instruments most

JANUARY 1830.

Sayre  
v.  
Lucas.

---

usually executed among us, and we probably see ten of them, for one promissory note. But what law have we which permits promissory notes to be passed in this way, if bills single cannot? The former are no more negotiable with us, than the latter. All equitable defences can be made by the maker of the one as well as the other, when transferred to a third person; and yet I understand that while bills single are to be thus restricted, a different rule is adopted with respect to promissory notes. According to Lord Holts opinion, and that of a majority of judges and lawyers of the present day, nothing but the statute of Ann gives to promissory notes negotiability; that statute has no place on our statute book, but our acts of Assembly treat bills single and promissory notes alike. That able jurist, Judge Kent, in the third volume of his commentaries, page 59, lays down the doctrine in the same way in which it is maintained by Judge Story, and adopted in this opinion.

Having disposed of the two first positions taken by the defendants counsel together, I come now to examine the last: which is, that our statute prescribes "assignment" as the only mode by which an instrument of this kind can be transferred, so as to vest in the holder a right of action.

This act declares, "that all bonds, obligations, bills single, promissory notes, &c. shall and may hereafter be assigned by indorsement, whether the same be made payable to the order or assigns of the obligee or payee, or not; and that the assignee shall and may sue in his own name, &c." It seems to me that a simple question might put down the objection raised on this statute at once. Was it a restraining or was it an enabling act? Certainly not the former. The object was to enlarge the powers of holders of these instruments, except so far as it repealed a previous statute, making promissory notes negotiable; and it is against all rule to construe a statute having this object, in a way which would give it a contrary effect. But the meaning of the words, "whether the same be made payable to the order or assigns of the obligee or payee or not," can very readily be perceived, and full effect given to them, without any such restraining construction. By the Law Merchant, bills and notes are not negotiable, unless the words "or order," be inserted in them; although a good bill or note, so far as the parties to it are affected; yet these words are essential to render it

JANUARY 1830.

Sayre  
v.  
Lucas.

\* See Chitty  
on bills 66.

negotiable.\* The framers of our statute then evidently intended nothing more nor less than that these words, or any tantamount to them, should not be necessary to make an assignment of such instruments valid, and to give the assignee a right of action.

From the best exercise of my judgment, I have formed the opinion that the judgment of the Circuit Court should be reversed.

JUDGE SAFFOLD, concurred with JUDGE TAYLOR.

Judgment affirmed.

JUDGE WHITE not sitting.

---

#### DRISH V. DAVENPORT.

1. In an action for the seduction of the plaintiff's daughter, evidence of a promise of marriage is not admissible.
2. The character of the daughter for chastity may be impeached by general reputation, but not such as is confined to particular classes of persons.
3. The contents of letters which are lost may be established by any one; the person to whom they are written is not the only competent witness for that purpose.

DAVENPORT declared against Drish, in the Tuscaloosa Circuit Court, in an action of trespass on the case, for the seduction of the daughter of the plaintiff. He charged that his daughter, Eliza, had been seduced and gotten with child by the defendant, whereby he lost her services as a servant, and was put to expense on account of her pregnancy and delivery, and nursing of her child, &c. At March term, 1827, a verdict was found for the plaintiff, for \$1,525, damages.

On the trial in the Court below, the defendant introduced witnesses, who stated that previous to the defendant's acquaintance with the plaintiff's daughter, they had frequently conversed with many young men of the town where she resided, with whom she was acquainted, relative to her chastity, and so far as they had conversed, the belief was general among those young men, that she was not a virtuous but an unchaste woman. The Court decided that evidence of her general character in the neighborhood

was alone admissible, that this was too circumscribed to be considered as such, and it was rejected. The plaintiff examined witnesses to prove by parol, the contents of certain letters written by the defendant, to the plaintiff's daughter, the originals having been proven to be lost, to establish the fact of the seduction, and also that there had been a promise of marriage. Some of the letters appeared to have been dated in the summer of 1823, and some were without date; the child having been born in July, 1823. The evidence of these letters was objected to by the defendant, because not proved by the daughter, to whom they were directed, who it was contended was the best witness to prove that fact, her absence not being accounted for; and also on the ground that the evidence was not proper to prove the issue; but the objections were overruled. The plaintiff further offered to shew that previous to the seduction, there had been a promise of marriage by the defendant, to the plaintiff's daughter. This evidence was also objected to by the defendant, but on its being shewn that the plaintiff's daughter had since married, though still objected to, it was received by the Court, who instructed the jury that if they believed there had been a previous promise of marriage, they might take it into consideration in estimating the damages. At the request of the defendant, the Court instructed the jury that no promise of marriage made subsequent to the seduction, was admissible to enlarge the damages, but with the qualification, that the jury might infer and had a right to presume, from proof of promises subsequently made, that there had been a previous promise of marriage, as the letters dated in 1823, referred to promises previously made, though no time was specified when they had been made. At the conclusion of the bill of exceptions, it was stated that the evidence of a promise of marriage was permitted alone with a view of shewing the estimation in which the plaintiff's daughter was held by the defendant, and in that way to make him a witness in favor of her virtue.

The several decisions of the Court, as above stated, were assigned for error by Drish, the appellant, upon which there was a joinder in error, and the death of the appellee being suggested, his administrators were made parties in this Court. <sup>a</sup>

SHORTRIDGE argued for the appellant. <sup>b</sup>

JANUARY 1836

Drish  
v.  
Davenport.

<sup>a</sup> 2 Tidd 1096;  
846, 1024.  
1 Bacon 8.  
2 Saunders  
72.  
<sup>b</sup> 1 John. Rep.  
296. 3 Camp.  
519. 2 Phillips  
Ev. 159, 160.  
2 Starkie Ev.  
369. 1 Bacon  
302. Peakes  
Cases 156.

JANUARY 1830.

Drish  
v.

Davenport.

a 3 Serg. and  
Rawle 366.  
b Esp. Cases  
236. 2 Starkie  
366. 1 Term  
Rep. 754. 2  
Overton 93.  
2 Espinasse  
331.

b 1 Starkie's  
Ev. 356.

1 Starkie's  
Cases 187.

c Peak's Ev.  
17. Phillips

71. 1 Dallas  
65. 7 Term

Rep. 670. 2  
Starkie's Ev.

29. 30, 36,  
1 Salk 236.

7 Term Rep.  
663. Note.

d 2 Phillips  
Ev. 156.

2 Esp. 519.

e 1 Bibb 298.

1 Starkie 434.

f 3 Starkie's  
Ev. 1310, &  
Note O.

5 Price 641.

15 John. 146.

2 Wheaton's  
Selwyn 845.

2 Phillips 159.

3 Campbell  
519. Peake

355.

g 3 Esp. N. P.  
R. 119.

2 Phillips Ev.  
156, 7, 160.

3 Starkie  
1308.

2 Wheaton's  
Selwyn 845.

11 East 23.

Reeves Do-  
mestic Rela-  
tion 291.

h 2 Phillips  
155. 2 Cames.

Espinasses  
Cases 240.

Anthons N.  
F. 196.

4 Term Rep.  
652. Norris  
Peake 545.

**BARTON & STEWART**, for the appellee. The evidence of the conversations with the young men was improper; it is the general reputation alone that is admissible, and even that is a loose kind of evidence; it is but presumptive at best, and the rule should not be extended. <sup>a</sup> Any witness who knows the fact, is competent to prove the contents of a letter which is lost, <sup>b</sup> and there was no error in admitting that proof. <sup>c</sup>

In relation to the last point, the question is not generally whether a marriage promise is admissible evidence in such an action, but the true question here is, was not such evidence proper as rebutting testimony, when the character of the daughter was impeached? The defendant below alleged she was previously unchaste; to rebut this it is material to shew that the defendant did not so consider her, and as an evidence of it, that he promised her marriage. <sup>d</sup> It was allowed for this purpose; for it is so expressly stated in the bill of exceptions, and in construing the bill, it must be so viewed; the bill is to be construed most strongly against the party tendering it, and in fact, in practice, it is drawn up by his counsel, and if too strong in its language, the judge will in general qualify it, as was probably the case here, by adding something to it; unless this view is taken, it would appear to be contradictory. <sup>e</sup> But on general grounds, the evidence was proper. <sup>f</sup> This is said to be an action given to the father to compensate him for the injury to his feelings. <sup>g</sup> It is very material to inquire if he connived at the intercourse with his daughter, for if he did, he cannot sustain the action at all. The next inquiry is, was he censurable for this neglect; and this is a most important inquiry; indeed, it is from these circumstances that the amount of damages is always graduated; then it was proper evidence, with a view to shew on what footing he permitted the defendant's visits. <sup>h</sup> If this evidence is rejected, a father careless of his daughter's conduct, is placed on the same footing with the father who is prudent and watchful; and certainly there is much difference as to the damages they deserve; here the father shewed that if he was seemingly careless in suffering intimacy between the defendant and his daughter, it was because he felt fully justified in so acting, as a promise of marriage was mutually interchanged. Again, if it be to compensate feeling, is not the injury aggravated by means employed to deceive, and effect the seduction; and if it be to punish the offender, does he not deserve to be more

punished, when he has resorted to such means to effect his purpose? <sup>a</sup> Under every aspect, upon the principles of the law, it should be admissible evidence. It is a part of the *res gesta*, and tends to elucidate the facts of the transaction. <sup>b</sup>

But upon authority, although it is stated by most elementary writers that evidence of such promise is not admissible, yet no case can be found, where the principle is directly so decided. In many opinions it is carelessly assumed in argument, and adopted without sufficient reason or investigation; and in no case is it decided upon its own merits, but only intermixed with other questions. The misapprehension grows out of this, and on a minute examination, and by searching the authorities to the bottom it will be found that the objection started in the first cases, did not grow out of the objection to the evidence itself, but it was to the admissibility of the proof by the daughter. <sup>c</sup> When those cases were decided, the rule of evidence was, that any person interested in the question, was an incompetent witness; hence the objection, as in every one of the old cases, the proof offered as to that fact was by the daughter, and she was interested in the question, having a right of action herself. This distinction has not been attended to, and the principle has been loosely copied from one book to another, and finally adopted by judges, from finding it so laid down by the elementary writers, without examination, and without discriminating the reason for the old decisions. But no case is even now to be found, where the naked principle is decided as contended for by the appellant. The old rule of evidence is now exploded, and the daughter would be a competent witness to prove the promise; <sup>d</sup> but in this case the proof was made without her evidence; it is rid of this objection. It is no reason to say the promise is not alleged in the declaration; it is here used as rebutting proof. Neither is the objection good, that the daughter has her separate action on the promise. The promise is not here made the foundation of the action; it is matter incidental; besides, if a man does an act which injures several persons, he owes remuneration to each of them, and it is no answer to say that another may sue also. Moreover, in this cause it was shewn the daughter had since married, she could then bring no action; is this not an exception, as the reason fails? The point is an important one, and should be correctly settled, it is here *res integra*.

HOPKINS, in reply.

JANUARY 1830.

Drish  
v.  
Davenport.

a 3 Mass Rep.  
73, 546. Nor-  
ris' Peake  
542, 5. 2 Esp.  
531. 3 Star-  
kie's Ev.  
1308, 9.  
3 Esp. Rep.  
119.  
b 3 Esp. N. P.  
R. 119.  
1 Starkie's  
Ev. 40.  
2 Phillips 160.  
3 Mass. 546.

c Norris'  
Peake 544,  
241. Strange.

d 2 Caine 291.  
2 Term R. 4.

JANUARY 1830.

*Drish*  
v.  
*Davenport.*

---

By JUDGE WHITE. It is insisted in the first place, that the evidence offered affecting the reputation of the plaintiff's daughter for chastity should not have been rejected by the Court below. It must be conceded that the defendant could prove the want of chastity in the daughter, in mitigation of damages, if the evidence offered for that purpose was in its own character admissible. The evidence was conversations with young men of the town where the daughter resided, who professed to be acquainted with her, stating their belief that she was unchaste. Such proof as this, if adduced to general character, was too circumscribed, and if designed to establish any particular act of lewdness, was obnoxious to the objection that the authors of the report were not upon oath when they communicated the facts spoken of in conversation, nor subjected to the legal test of cross-examination. The Circuit Court then, in rejecting this evidence, did not err. Again, it is insisted that there was error in permitting the plaintiff below to introduce parol evidence of the contents of letters purporting to have been written by the defendant to the plaintiff's daughter; the letters having been shewn to be in the hand-writing of the defendant, and previously lost. The contents of these letters were proven, to establish, first, the fact of seduction, and secondly, a promise of marriage. The objections taken are, that as the knowledge of the plaintiff's daughter was the best evidence of their contents, and her absence not accounted for, other proof was secondary, and should not have been admitted; and furthermore, that they were illegal testimony under the issue joined. The witnesses sworn had seen the letters, and their knowledge of their contents was the same grade of evidence with that of the daughter to whom they were addressed, and consequently they could be proven as properly by them as by her. They contained admissions of the seduction, a material part of the issue, and to that extent certainly were admissible. But whether in this action by the father for the seduction of his daughter, the Court should have permitted a promise of marriage to be given in evidence to the jury, presents the last and most important inquiry raised by the argument.

The present is in form an action for the loss of service. But according to the indulgent practice of the Courts, this is often, if not always, the least important consideration for the jury. They may and should, in

JANUARY 1830.

Drish  
v.  
Davenport.

---

the language of the books, remember that it is an action brought by a parent for an injury to his child, and take into consideration all that he can feel from the nature of the loss. They may look upon the parent as loosing not merely the service, which is comparatively a paltry thing, but the society of his daughter, in whose blasted virtue even his confiding heart can no longer repose. They may view him as the father of other children, whose morals may be infected by the example of a ruined sister, and whose standing in life cannot but be injured by her disgrace. All these considerations may be weighed by the jury in estimating damage, and proof of the situation of the father, of his family, and other circumstances auxiliary to such an inquiry, may be adduced; but notwithstanding the great latitude allowed to plaintiffs in this kind of action, there are limits beyond which they cannot go. The boundary which the law has prescribed for the different forms of action is so essential to the rights of parties, and the wholesome administration of justice, that they should not be entirely disregarded, even to reach with the severest lash, the vile seducer who has despoiled the daughter of her virtue, and her father of his peace. It is a principle of natural justice, that a man, however great the injury he has inflicted, should not be compelled to pay twice for the same substantial cause of action; and if he is ever held responsible to more than one, it is because he is considered as having done distinct injuries to each. Hence the existence of the rule, that although you may give in evidence all that really constitutes the *res gesta*, to explain the true nature of the transaction, and the accompanying circumstances, to enlarge the damages, yet it is with this restriction, that whenever the evidence offered amounts in itself to a distinct and substantive cause of action, it must be rejected. Apply these principles to the case at bar: the action is by the father, for a tort; the daughter is likewise entitled to her suit for a breach of marriage contract, and whatever length the law may have gone in its sympathies for the suffering parent, it would be a total destruction of its own land marks, to permit a promise of marriage, which in itself constitutes the distinct ground of a separate action by a different person, to be given in evidence to the jury. Again, this action is *ex delicto*, and the promise of marriage *ex contractu*, which makes in estimation of law such an entire distinction, that they



JANUARY 1830.

Drish  
v.

Davenport.

could not be joined in the same declaration, by the same plaintiff. But furthermore, the object of the pleadings is to give notice at least to a reasonable extent; and it is obvious, that if, when called on to answer one cause of action, the defendant could be proceeded against for an injury so essentially different as to require a distinct form of action, he would be taken by surprise, and condemned without an opportunity of preparing for his defence. After this slight view of the case upon principle, I will proceed to examine it upon authority.

<sup>a</sup> Marginal  
Page 159.

In 2d Phillips, <sup>a</sup> it is said in relation to this kind of action, "evidence of the defendant's having given the daughter a promise of marriage, is not admissible," and the reason assigned is, "because the breach of such an engagement may be made the subject of another distinct action."

<sup>b</sup> 3 Camp.  
519.

In the case of *Dodd v. Norris*, <sup>b</sup> it is said, that after cross examination of the daughter, to shew that she had submitted herself to the defendant's embraces under circumstances of extreme indelicacy, she was asked, whether the defendant had not promised her marriage. This was objected to, and Lord Ellenborough, as if doubting whether they might go even that far, and cautious not to violate the rule, observes, "I think you may ask her whether he paid his address to her in an honorable way. But further than this, you can on no account go." He continues to assign the reasons in these words: "To admit evidence of a direct promise of marriage, would be to allow the parent to recover damages for a breach of that promise upon the testimony of the daughter." His Lordship also, in adverting to the nature of the action, and the anomaly, that when loss of service was established, a further compensation is allowed for an injury to parental feelings, says: "It is necessary to watch that this anomaly should not be carried farther, and that the original scope of the action should not be lost sight of." This same doctrine is to be found in *Norris' Peake*, <sup>c</sup> and indeed it seems to run through all the books that I have examined, with the exception of Starkie's own suggestion in his treatise on evidence. <sup>d</sup> Here the author, while he himself questions the doctrine, admits its existence upon authority. In the case cited from 1 Johnson 297, it appears that Mr Justice Livingston had violated this principle, on the Circuit, to a great extent. But when the case came up for revision, he candidly admitted his error, by observing, "the daughter was not only interested to say what she did in support

<sup>c</sup> Page 544.

<sup>d</sup> Page 1309.

JANUARY 1830.

Drish  
v.  
Davenport.

---

of her own character, but was swearing to enable the father to recover in an action for the loss of his daughter's services, compensation for a breach of promise of marriage, in itself a substantive and distinct cause of action, with which he had nothing to do, and against which the defendant could not be ready to defend himself." He adds, "testimony of this nature never was admitted in England." The other members of the Court also recognize this principle, and say the daughter cannot be a witness to prove such promise; for they observe, "she has herself a cause of action against the defendant. The father's action is *fort*, that of the daughter, for breach of promise." This examination of the books shews that there is an unvaried current of authority in favor of the position, that in an action by the father for the seduction of his daughter, evidence of a promise of marriage should not go to the jury. It is however contended by defendant's counsel that it is not the evidence itself, but the source whence it comes, that constitutes the strength of the objection laid down in the authorities. In some of the cases cited, it is true, the Courts seem to lay stress on the fact, that the promise was proven by the daughter; but I cannot perceive how this varies the principle. If lawful to prove it at all, why not by her as well as another? Formerly, it was held that she had such an interest in the question as would exclude her testimony altogether; but the more liberal views of modern times have overruled this doctrine. She certainly has no interest in the record; as a recovery by the father could not be given in evidence by her in a *suit* for breach of marriage contract; nor could what she might testify in the one case, be adduced in her favor in the other. If, as I admit, it is reasonable to suppose she might be inclined to lessen her own infamy by proving a promise of marriage, this would rather affect her credit than destroy her competency. It is not then, as I presume, because of the daughter's incompetency to prove the fact, that it has so uniformly been excluded, but because the evidence itself is inadmissible. Again, it should not be forgotten, that from the very nature of the fact to be proven in such cases, the daughter would almost universally be the only person who could know it; and hence the question has so generally arisen upon the attempt to prove it by her testimony alone. But enough can easily be collected from the authorities, to shew that the principle of exclusion exists independently of that cir-

JANUARY 1836.

Drieh

v.

Davenport.

cumstance. In the case already cited, from 1st Johnson's Reports, Judge Livingston, though he refers to the fact that he permitted the daughter to prove the promise of marriage, yet he by no means relies on that as the main reason why he erred on the Circuit; but emphatically remarks, "that the promise of marriage was a distinct cause of action, with which the father had nothing to do, and against which the defendant could not be ready to defend himself." Phillips, an elementary author of great respectability, lays down the doctrine as contended for, without any qualification, as appears from the quotation already made; and it is remarkable that Starkie, whose *dictum* is the only semblance of authority adduced to shake the position I maintain, in the very place where he states the doctrine to object to its principle, takes it from the same reporter and gives it in the same language that Phillips does, not laying any stress on the circumstance of the daughter's being the witness. His words are, "it has been said, that evidence that the defendant prevailed by means of a promise of marriage, is inadmissible," and then proceeds to give his own opinion. Here then, are two writers of acknowledged accuracy, the one for and the other against the principle in question, who both derive it from 3d Wilson, and both concur in stating it without restriction. It is surely then a fair presumption, that if the original reporter could be had, it would be found there maintained, that in an action like the present, evidence of a promise of marriage should not be given by the daughter or any other person. But the counsel for defendant in error insist, that as the bill of exceptions shews that proof of a promise of marriage was permitted to go to the jury, not to affect the damages, but to sustain the character of the daughter, previously assailed, it was in this view unexceptionable. If it were granted that this was the only design of the Court in admitting the evidence, I should still think there was error; for even then, there would be no reasonable certainty that it was not considered of by the jury in estimating the damages, and being calculated to produce illegitimate consequences, it should have been entirely excluded. But from the bill of exceptions it appears, that when first proposed, it was objected to, and upon its being shewn that the daughter had married another since the promise of marriage made to her by the defendant, though still objected to, the Court permitted the evidence to be given, and charged the jury

that if they believed there had been a previous promise of marriage, they might consider the same in estimating the damages. True, in the latter part of the bill of exceptions, it is said that the evidence of promise of marriage was admitted, with a view alone of shewing the estimation in which plaintiff's daughter was held by defendant, and in that way to make him a witness in favor of her virtue. These two parts of the bill of exceptions are evidently incompatible. But even if we take the latter statement as presenting the true aspect, still the evidence was admitted, and might have had, because calculated to produce, an effect which the law cannot sanction. I am then of opinion, that for this error the judgment should be reversed; and as Davenport, the plaintiff below, has departed this life, and the action is to redress a personal wrong, we think it cannot be revived, and therefore that the case should not be remanded.

JANUARY 1830.

Drish  
v  
Davenport.

By LIPSCOMB, CHIEF JUSTICE. It is with extreme reluctance, that I have yielded my assent to the reversal of the judgment in this case, and I have at last been compelled to subject the best reasoning of my mind on the question, to the influence of adjudged cases. I had hoped that some contrariety of decision might be found, that would authorize us to sustain the judgment of the Circuit Court; but in this I have been disappointed; the authorities are all opposed to it. Starkie expresses his own opinion of what the law ought to be, and it does seem to me, that there is much good sense in it.

That such testimony should not be admitted in the first instance, is abundantly clear; for the reason that the promise of marriage could be made the ground of an action for its breach. But when it has been attempted to be proven by the defendant, that the father had exposed his daughter by gross neglect and indifference to her conduct, and had thereby invited the seducer to an attempt on her virtue, the father should surely be then permitted to rebut so disgraceful an imputation, by proving that he had every reason to believe the addresses of the seducer were honorable, and that interviews were permitted between the two young persons, under the solemn sanction of a marriage promise. What parent would not relax in his vigilance after a marriage promise had been entered into between his daughter and the man of her choice; and that choice too, approved by himself? He would be apt,

JANUARY 1830.

Drish  
v.  
Davenport.

---

under such circumstances, to look upon them as one, in the eye of the soundest canons of morality, and as requiring nothing but the forms of law to make them husband and wife. If under the sanction of such a promise, he permitted them to be alone frequently, who would say, that for such confidence he deserves his shame, when the man whom he had thought but little less than a ministering angel, had proved a fiend, and had filled for him the cup of bitterness, and compelled him to drink its dregs. These considerations are all met by adverse authority; and we can only regret, that a rule of evidence more consonant to reason and to the ends of morality, had not been established.

JUDGE TAYLOR concurred with JUDGE LIPSCOMB, in the views above expressed.

Judgment reversed.

---

#### M'GOWEN and WIFE v. YOUNG.

1. Though a party be enjoined from removing property out of the State, by a Court of Chancery, yet he may maintain trover for its conversion.
2. In trover, if the plaintiff has not the entire interest in the property, the defendant may shew it to reduce the damages, and the plaintiff may recover to the extent of his interest.
3. The answer of a party in Chancery is proper evidence against him, and so much of the bill as is necessary to explain the answer.

THIS writ of error was prosecuted to reverse the judgment of the Circuit Court of Tuscaloosa county, rendered in an action of trover. E. Young commenced the suit in said Court on the 3d of January 1827, against Mary Ann Hill, who since the rendition of the judgment intermarried with M'Gowen, for the conversion by her of four negroes. At March term 1828, a trial was had on the plea of the general issue, and Young obtained a verdict and judgment for \$1425 damages.

On the trial, the defendant Mary Ann offered in evidence the record and proceedings of a Chancery cause, then still pending and undetermined in said Court, on the equity side; The proceedings consisted of a bill originally filed by Thomas Hill, her former husband, against Young, the plaintiff, and others his creditors, in 1824;

JANUARY 1830.

M'Gowen and  
Wife  
v.  
Young.

a bill of revivor filed by said Mary Ann, as administratrix, and a supplemental bill filed by her: also the answer of Young to the original bill, and several interlocutory decrees made in the cause, bonds, process, sheriff's returns, &c. The bill filed by Thomas Hill charged that Young was entitled only to a life estate in the slaves, that the father of the wife of E. Young had conveyed them to her, and in case she died without lawful issue, that then they were to go to the complainant and his heirs; that Mrs Young was likely to have no children, that Young had got in debt and had absconded, and that his creditors had levied attachments on the slaves, which were about to be sold, &c. On this bill an order was made by the Chancellor, to restrain all persons from removing the slaves out of the jurisdiction of the State, unless bond and security were given to secure the remainder belonging to Hill, according to the further order of the Court. In 1825, T. Hill died, and his widow, Mary Ann, filed a bill of revivor as administratrix. In 1826, Young returned and filed his answer to the bill. Under these circumstances, no bond having been given by Young, the negroes came to the possession of Mrs Hill, on the first January 1827. After the suit was brought, and before the trial, Mrs Hill filed a supplemental bill against Young, alleging he was still improvident, that he had endeavored to sell the slaves, that there was still no prospect of Mrs Young's having any issue; that the remainder belonged to her children whose guardian she was, and praying the further order of the Court for the security of the remainder, &c. Upon this, a further order was made by the Chancellor, requiring the sheriff to take the negroes into his possession, and if within a certain time after notice Young did not give the security required, that they should then be delivered to Mrs Hill, on her giving the security required by the order, &c. Young having failed to give the requisite security, the slaves, under this order, had been delivered by the sheriff to Mrs Hill the defendant, she having complied with the terms of the order of the Chancellor. This occurred previously to the trial at law. Young had not yet answered the supplemental Bill, had failed in giving any security, and the proceedings were still pending in the Court of Chancery. This evidence, and each part of it, was rejected by the Court, and deemed inadmissible, except the answer of Young, and so much of the bill as was necessary to explain the answer.

JANUARY 1839.

M'Gowen and  
Wife.  
v.  
Young.

The above is the principal matter shewn by a bill of exceptions taken on the trial, and the decision rejecting the evidence is assigned for error, by the defendant below Mary Ann, and M'Gowen her husband, who was admitted a party as such in this Court.

BARTON & STEWART, for the appellants.

SHORTRIDGE, CRABB and P. N. WILSON, for the appellee.

By LIPSCOMB, C. J. The first order of the Chancellor did not operate on the property in controversy, but simply enjoined it from being removed out of the jurisdiction of the Court. If this order had directed the sheriff to take possession of the property, so long as the order had any influence, it would have barred the plaintiff's suit at law. But the plaintiff was then in the peaceable and rightful possession, and it was only a possible residuary interest, that complainant sought to secure. He then had a right to sue for the property, at the time the suit was commenced, even if the residuary interest was in the complainant. It is contended however, that the second order of the Chancellor on the supplemental Bill, interposed a bar to a recovery. If the plaintiff had a right to the property at the time he commenced suit, which is not controverted, he had a right to recover damages for its conversion, commensurate with his interest; and the subsequent order of the Chancellor, could not affect such right, as it did not enjoin the suit at law.

The counsel for the plaintiffs in error has attempted, with much ingenuity, to assimilate the proceedings in chancery to the admiralty process, operating *in rem*; and he would draw the conclusion, that the strange and anomalous case of two jurisdictions, both operating at the same time, on the same property, was presented. The premises from which this conclusion has been attempted to be drawn, are not well founded. The two Courts were not proceeding at the same time against the property. Chancery can at all times proceed *in rem*, but such had not been the course in this case. The suit at law is not of that character, nor does it seek a recovery *in specie*. If the action had been detainue, it might have been urged with much force, that the last order of the Chancellor, on the complainant's Bill, would afford an excuse for not delivering the property. But in the action of trover, it

could certainly be no defence. It was urged, however, that if the testimony could not amount to a defence to the action, yet it ought to have been received in mitigation of damages. A slight examination will show that this position is wholly untenable. In this action, and on the issue joined, the jury could fairly take into consideration, by way of reducing the amount of damages, the value of the complainant's residuary interest in the property in contest; and evidence of a legal character, should have been admitted to show what was the probable value of such interest. But neither the Bill, the supplemental Bill, nor the several orders made by the Chancellor, could have proven that complainant had any interest, either present or in expectancy, in the property sued for; the answer of Young, so far as he made admissions against himself, was proper testimony, and it was admitted by the Judge who tried the cause; it was right enough too, to refer to the Bill for explaining the answer. Suppose the testimony rejected had been admitted, it could only have tended to mislead the jury, if it could have any effect at all. And if it had induced the jury to reduce the damages to a mere nominal amount, what possible remedy could the plaintiff at law have resorted to? The judgment would have vested an absolute right to the slaves in the defendant, although by her own shewing, she claimed only a possible reversionary interest in them, on the contingency that Mrs Young, the wife of the plaintiff, should die without issue capable of inheriting. We are therefore of opinion that there is no error in the judgment of the Circuit Court.

JANUARY 1839.

M'Gowen and  
Wife.  
v.  
Young.

---

Judgment affirmed.

JUDGE CRENSHAW, not sitting.



## LUCAS V. THE BANK OF DARIEN.

2s 280  
122 564

1. If no notice be given of the dissolution of a copartnership, it will be considered as still existing, as to creditors.
2. The rule in such cases is, that to those who have had previous dealings with the firm, actual notice must be given; and notice in a Gazette, to those who have had no previous dealings.
3. A change of pursuits by one partner, is not sufficient notice, nor is a removal out of the State.
4. The rule is not varied, though the creditor be a bank, established after the dissolution.
5. To charge the bank with notice of the dissolution, after a judgment at law, it is not sufficient to shew that the partner who received the credit, was one of the directors of the bank.
6. Judgment obtained in a sister State, when the Court there had no jurisdiction over the person, is not binding here, and the want of jurisdiction is a good plea at law; therefore, Equity will not relieve against a recovery at law on such judgment.
7. A partner may appoint an agent to make and indorse bills, &c. and such power is not void, although granted under seal by one partner only.
8. Whether such power can extend to authorize the agent to enter appearances for copartners—*Quære*.
9. Equity will not relieve against a judgment at law, for mere technical defects in the proceedings.
10. In Equity, all parties in interest should be joined; but to this rule there are exceptions.
11. Those only against whom process is prayed, are to be considered as defendants in an Equity proceeding.
12. A bill for discovery must state the matter sought to be discovered, shew that it is material, and state the nature of the defence at law; and not deal in vague inquiries.
13. Affirmative allegations in an answer, not responsive to the bill, must be proved at the trial.
14. But where the answer is not traversed, it is to be taken as true—*Scilicet*.

WALTER B. LUCAS filed a bill in Equity in the Circuit Court of Montgomery county, against the Bank of Darien, for relief against several judgments at law, which said bank sought to enforce against him.

The bill charges that the complainant and one John Lucas had formerly been copartners in trade, under the firm of J. & W. Lucas; that they transacted business in Milledgeville, and also in Twiggs county, Georgia, and that they were also concerned in the house of Lucas, Goodall, & Co. that on the 18th of May, 1818, they dissolved their copartnership, and a written agreement was executed as follows:

“Milledgeville.—Owing to a dissolution of the copartnership of J. & W. Lucas, and Lucas, Goodall, & Co. I here this day, clear said W. Lucas, of said firm of J. & W. Lucas, and Lucas, Goodall, & Co. of all his liability and responsibility of all demands, debts, contracts,

accounts, or otherwise heretofore made or contracted, and he, said Walter Lucas, taking the stock of goods, debts, and the inclusive establishment in Twiggs county, as an equivalent for his interest in said firm of John & W. Lucas, and Lucas, Goodall, & Co. and John Lucas, taking the establishment at Milledgeville, and all things thereto appertaining, as an equivalent for my interest, I paying all debts, &c. Given under my hand, this 18th May, 1819.

JOHN LUCAS."

JANUARY 1830.

Lucas.

Bk. of Darien.

That the complainant, since that time, had no partnership transactions in Georgia, and no concern with J. Lucas, but was concerned in business with one Henry Lucas, in Alabama.

He charges that in 1818, the Darien bank was chartered, a branch of which was established in Milledgeville, and went into operation only after he removed to Alabama, and with which he never had any dealing; that John Lucas was a large stock holder, and was a director in said branch bank, and continued so till July, 1820; and that after the complainant's removal, in 1819 and 1820, John Lucas became embarrassed by erecting large buildings in Milledgeville, and to relieve himself, obtained loans from the branch bank on twelve notes, which they discounted in May, June, July, August and October, 1820, amounting to \$29,087 75. The notes were signed in the name of J. & W. Lucas, in some of them as makers, and others as indorsers; and some were made and some indorsed in the name of J. & W. Lucas, by T. Fort as their attorney; that Fort signed them by virtue of a power of attorney under seal, made by John Lucas, in May, 1820, in the name of J. & W. Lucas, two years after the dissolution of the partnership. He charges that the notes and power were made, and all the transactions done, entirely without his knowledge, authority or consent, and that John Lucas received all the proceeds to his own use; that the pursuits and embarrassments of John Lucas were known to the bank, that they knew the complainant had removed to Alabama, notwithstanding which, they discounted the notes in the name of J. & W. Lucas, without any proof that they were partners, or ever giving notice to the complainant.

It is further alleged, that in August, 1820, after the principal amount of the notes was discounted, and when part was due, the branch bank, without the knowledge or consent of the complainant, made an arrangement with

JANUARY 1830.

Lucas.  
v.  
Bk. of Darien.

---

John Lucas, and on certain conditions, extended the time of payment of the amount discounted, for twelve months; and a consolidated note, as the complainant is informed, was received by them, of J. Lucas, in the name of J. & W. Lucas, for the whole, with security; after which they again granted him other discounts; and that in November following, all the original notes were protested for non payment, of which no notice was ever given to the complainant; that the directors, though aware of the embarrassed situation of John Lucas in the summer and fall of 1820, yet took no steps to coerce payment of the notes till February or March, 1821, when they brought suits in the Superior Court of Baldwin county, Georgia, and in some of the cases service of process was acknowledged by John Lucas, in the Name of J. & W. Lucas, and in others, by one T. H. Kenan, by virtue of a power of attorney made by said John Lucas, and that the complainant at no time during the pendency of the suits, had any notice of their existence; that in August, 1821, after the suits were commenced, and before trial, John Lucas died; notwithstanding which, the bank proceeded to judgment against both him and the complainant; that about the same time, suits were also brought against W. D. Lucas, as maker of some of the notes, and as indorser of others, and before judgment the branch bank compromised with him, received a part, and exonerated him from the remainder; but how much he paid, the complainant does not know. He also states that he is informed and believes, that Hunter made considerable payments, but the amount he does not know.

It is further shewn by the bill, that in August, 1822, the bank instituted in Montgomery county, Alabama, seven suits on seven of the notes, against the complainant, to which he pleaded that judgments had been previously rendered against him on the notes, in Georgia, on which plea, judgments were rendered for him; that afterwards in March, 1826, twelve suits were brought against him on the records of the judgments obtained in Georgia, which last have, by order of the Court, been consolidated into one suit, which is still pending. The complainant alleges, that he is informed that the correspondence between the branch bank and said John Lucas, in relation to the extension of time of payment of the notes, is in the possession of the directors, and that he has no legal means by which he can procure proof of it to be used at law; that

he is not in possession of the accounts of said John Lucas, with the bank, shewing the payments made by W. D. Lucas and Hunter, and has no means to prove them at the trial; that the judgments rendered in Georgia, although illegal in that State, have not been set aside, wherefore he cannot defend at law. The prayer of the bill is, that an injunction may issue against the Darien bank, restraining them from further proceedings at law; and that a subpoena may issue to the president and directors of the branch bank, to answer &c. and for general relief against the Darien bank. The injunction was granted without security in July, 1826, and the bill was filed in March, 1827.

JANUARY 1830  
 Lucas  
 v.  
 Bk. of Darien,

In an answer and an amended answer filed by the Bank of Darien, they admit the complainant's residence in Alabama, but do not know when he removed there; they admit the copartnership but deny the dissolution, or at least, that such dissolution ever was made public, or that the Bank of Darien had any notice of it. They say the partnership was notorious, and if a dissolution had been known to them, no discounts would have been made by them. They admit that John Lucas was a stockholder and director in the bank, that he engaged in erecting buildings; that discounts were made to the firm; they do not know who received the proceeds, but believe it was the firm; they admit the making of the notes and indorsements by Fort, the attorney, and that it was under the power made in the firm name by John Lucas, and insists that the seal to it was surplusage and could not vitiate it, and they believe it was made with the complainant's knowledge and consent. They believe that complainant received a large portion of the proceeds of the notes, and deny that any fraudulent discounts were made, or that any arrangement was made for extending the time, or that any consolidated note was taken. They say that there were merely propositions made for that purpose, but which were not complied with, and the correspondence on that subject is set forth. They admit trying the suits in Georgia, and that service was acknowledged by John Lucas, in the name of the firm, and also by Kenan under a power made by John, but that it was proper as a partner to do so; and refer to exemplifications, as to the manner in which they were conducted, and insist they are valid; that the complainant knew of their pendency, and deny that they were rendered previous to the death of John Lu-

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

**CAS.** They admit that suits were brought against W. D. Lucas and Hunter, and shew what notes were settled, and deny any arrangement made with them that is prejudicial to the complainant. They admit that seven suits were brought, which resulted as charged by the complainant. They also admit bringing the twelve suits, and insist on their right to recover in them. They exhibit all the correspondence to be found relating to the matter, &c. and deny all fraud and unlawful combination, &c.

At March term, 1827, the defendants appeared and moved for a dissolution of the injunction, which was overruled without prejudice. At September term, 1827, a motion was again made to dissolve the injunction for want of equity in the bill, which was also overruled, on which the answer was filed. This answer was excepted to, and some of the exceptions were allowed, and others overruled; the amended answer was afterwards filed, which was also excepted to; but at March term, 1828, those last exceptions being all overruled, the injunction was dissolved, and the cause was on motion of the complainant, and by consent, set down for hearing on the bill, answers, and exhibits. The Circuit Court rendered a decree dismissing the bill, from which Lucas appealed to this Court.

The errors assigned are that the exceptions to the several answers should have been sustained, and the defendants below perpetually enjoined, and that the bill should not have been dismissed.

Wash. Rep.  
287. 1 Mun-  
ford 373.

7 Term Rep.  
207. 10 East  
417. 2 Caines  
Rep. 254.  
1 Hen. and  
Munf. 433.  
2 John. Rep.  
203. 1 Dall.  
Rep. 120.  
19 John. 573,  
531.  
8 John. Rep.  
67, 161.  
2 Kent 91, 13  
John. 192. 15  
John. 121. 4  
Cowen 393.  
9 East 192. 1  
Munf. 400. 3  
Dall. 301. 5  
John. 37.  
1 Dall. 31.  
1 Kirby 19.

**GOLDTHWAITE and THORINGTON**, for the appellant. The answers set up new matter in avoidance of the allegations in the bill; this new matter should have been proven on the trial, otherwise all the allegations in the bill might be admitted, and yet be avoided by new matter not responsive, which would necessarily compel the complainant to prove a negative. <sup>a</sup> John Lucas was a director of the bank, and therefore, the bank is properly charged with notice of the dissolution. One partner cannot bind his copartner by deed, <sup>b</sup> therefore, the notes executed by Fort under the power of attorney are void, and also the judgments rendered on them; <sup>c</sup> as much so as if they had been forged. There was no legal proof of the service of the process in those suits; where service is acknowledged, the hand writing must be proved: this was not done. <sup>d</sup> The bill does not shew there are judgments in

Alabama; the answer sets them out; this is new matter; and if the plea of former recovery binds the appellant, the replication of *nul tiel record*, binds the bank. When a defendant undertakes to answer, he must answer fully; <sup>a</sup> the amended answer is evasive as to Fort's agency, and alleges a ratification of it by the complainant, but which is not explained, nor is the acceptance of the service in Georgia; <sup>b</sup> nor is it shewn how much W. D. Lucas paid. We are in Equity entitled to an injunction against the proceedings here, and also to relief against the judgments in Georgia, on the ground that the Court has obtained jurisdiction and will retain it to do full justice.

JANUARY 1899.

Lucas

v.

Bk. of Darien.

<sup>a</sup> John. Ch. Rep. 45. 4 Ib. 265. 10 Vesey 52. 2 Mad. 338.

<sup>b</sup> John. 65. 1 Ves. 52. 4 J. C. Rep. 205. 2 Mad. 338.

BUGBEE, ROCKWELL and GORDON, for the appellees. An appeal from a final decree opens the whole case for consideration. We may then consider the case in two points of view; I. As made by the complainant upon the face of his bill alone; and II. As presented by the bill, answers and exhibits, jointly.

I. The bill shews no grounds for equitable relief. It is deficient in three respects.

1. The bank is not made a party. The objects of the bill are three fold: to discover facts from the branch bank; to injoin the appellees from proceeding at law; and to obtain general relief; but no process of subpoena is prayed against the bank. No one is a party, against whom process is not prayed; <sup>c</sup> and praying relief against the agent does not make the principal a party. All persons having an interest, should be made defendants, <sup>d</sup> and here the bank is not properly brought before the Court. It is true there are exceptions to this rule, but where a necessary party is wanting, the objection is available on the final hearing. <sup>e</sup> It is somewhat analogous to a want of jurisdiction, which is a good objection at any stage of the proceedings. <sup>f</sup>

2. The nature of the defence at law is not set out; and this is a fatal defect. <sup>g</sup> The bill is said to be for discovery of matters to be used at law; it seeks to injoin proceedings at law; it is not, therefore, an original bill. <sup>h</sup> Its character is to be determined from its objects, and matter on its face. If it could be viewed as a bill for general relief, bills of discovery, technically so called, would be unknown, Courts of common law would become useless, and jury trials would be of rare occurrence; it would destroy those land marks which experience has placed round legal and

<sup>c</sup> 1 John. Ch. Rep. 437.

<sup>2</sup> John. Ch.

Rep. 245.

<sup>7</sup> Ves. 257.

<sup>9</sup> Wheat.

Rep. 904.

Eden 231.

<sup>1</sup> Peters U.

S. Rep. 387.

<sup>2</sup> Atk. 510.

<sup>12</sup> Wheat.

Rep. 193.

<sup>d</sup> 8 John. Ch.

Rep. 590.

<sup>4</sup> Ib. 25. 7 Ib.

211. 3 John.

Cases 311.

<sup>596</sup> 10 John.

Rep. 167.

<sup>e</sup> 1 Peters U.

S. Rep. 306.

<sup>2</sup> Atk. 510.

<sup>f</sup> 1 Peters U.

S. Rep. 110.

<sup>g</sup> 2 Gaines

Cas. in Error

296. 1 C. Rep.

546. 3 Ib. 45.

<sup>h</sup> 9 Cranch 19,

25.

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

equitable tribunals, and break down those barriers which have been wisely raised, to prevent either Court from encroaching on the jurisdiction of the other. Chancery does not depend on the mere will of the Chancellor; its objects, boundaries and rules, are as definite as those of the law, and as inflexible.

It is considered as assistant to courts of law, by removing impediments to the fair decision of a question therein, by compelling a discovery which may enable them to decide. It is concurrent, in most cases of fraud, accident and mistake; but in cases of concurrent jurisdiction, the Court which first obtains jurisdiction, will keep it. It is exclusive in all cases of trust, and it exercises a general jurisdiction to prevent a wrong where the positive law is silent, or inadequate to afford a remedy. <sup>a</sup>

\* 1. Fontb.

3. The bill wants equity. The basis of jurisdiction for discovery is, that the subject of defence at law rests in the knowledge of the opposite party, and that the complainant has no other means to obtain it. <sup>b</sup> Material facts must be distinctly alleged so as to enable an issue to be formed, or to warrant a decrec. <sup>c</sup> Where they depend on aliunde testimony, they afford no equity. <sup>d</sup> The bill is objectionable on those grounds. Again, the matter, if true, could be used at law. It is said the judgments in Georgia are subject to a defence here for want of jurisdiction there, and a case in Cowen is relied on, <sup>e</sup> and other authors to support the position. Let this be granted; but it gives no equity jurisdiction; it was matter of defence to the suits in Georgia. The complainant brings himself within the qualifications of the decision in *Russel v. Clark's Exr's*. <sup>f</sup> viewing the bill as one for general relief, equity has no jurisdiction, it is clearly a case of legal cognizance. <sup>g</sup> The Court, therefore, properly dismissed the bill, and permitted the complainant to assert his rights at law.

† Eden on Inj.  
3. 1 John. Ch.  
Rep. 188.  
c 11 Wheat.  
Rep. 103, 119.  
d 1 John. Ch.  
Rep. 543.  
41b. 409.  
21b. 557.

e 4 Cowen  
Rep. 293.

f 7 Cranch 67,  
89.

g 1 Peters. U.  
S. Rep. 232.

II. Upon a consideration of the bill, answers and exhibits, the decree was proper. It is said that the answers allege independent affirmative facts, which are not responsive to the bill, and are unsupported by proof. The cause was set down for hearing on motion of the complainant, without any extrinsic proof, and though it is held that when a cause is set for hearing on bill, answer and proof, the replication may be considered as matter of form, and may be filed *nunc pro tunc*, yet when it is set for hearing on bill and answer, the doctrine is, that the whole is to be taken as true; <sup>h</sup> and the answer is evidence

h 7 John. Ch.  
Rep. 223.  
2 Wheat.  
Rep. 380, 3.  
1 Bibb Rep.  
277.

for the defendant, unless disproved by two witnesses,<sup>a</sup> and it may contain the circumstances corroborating the denial.<sup>b</sup> It was held in a recent cause in New York, that when the answer is responsive to the bill, and within the discovery sought, it is legal in all cases, whether it is a denial of some fact alleged by the complainant, or contains a fact set forth by way of avoidance.<sup>c</sup> This position is well warranted by authority, and upon principle, when a party resorts to the confessions of his adversaries he should take the whole together. But the answers do not sustain the objection; the facts stated are within the discovery sought; they are responsive, and only set out the dependant circumstances connecting the transactions.

It is said the injunction should have been made perpetual. Where the material facts charged in the bill are denied by the answer, there can be no decree against it.<sup>d</sup> The equity was supposed by the chancellor who sustained the exceptions, to consist in, 1. The alleged compromise, 2. The making and indorsing of the notes by Fort, and 3. The making of the acceptance of the service of the writs in Georgia. All those grounds are disposed of by the answers. As to the effect of the judgments in Georgia, it is contended they are conclusive. If they are conclusive in Georgia, they must be so here; they must here have the same faith and credit as in Georgia. By the answer, it is admitted that the service was accepted by J. Lucas; but it is not admitted that the partnership was dissolved; and it is shewn that the complainant had notice of the pendency of the suit, and that he ratified and adopted the acts of J. Lucas, by pleading the judgments in his defence. The partnership being established, the acceptance of service by J. Lucas bound his copartner.<sup>e</sup> A partner is bound by the answer of his copartner in chancery;<sup>f</sup> he may authorize an attorney to appear, and the acts of the attorney will bind the firm. The change of residence makes no difference, and his being a copartner charges him with notice of all that was known to his copartner; what the agent knows, the law presumes the principal to know, and the knowledge of one copartner is the knowledge of both. There is no allegation that John Lucas had not authority to accept service. If the complainant made no defence, it is his own fault.<sup>g</sup>

There was no dissolution of the firm. The fact is obscurely charged, but is positively denied. To protect a retiring partner, there must be publication.<sup>h</sup> There must

JANUARY 1839.

Lucas  
v.  
Bk. of Daries.

<sup>a</sup> 1 John. Ch.  
Rep. 131.  
10 John. Rep.  
524.  
<sup>b</sup> 2 John Ch.  
Rep. 89.  
<sup>c</sup> 1 Cowen 711.

<sup>d</sup> 1 John. Ch.  
Rep. 211, 459.  
<sup>e</sup> 16. 91, 148.

<sup>e</sup> Gow on Pt.  
193, 56, 57  
483. 19 John.  
139. 2 Caines  
Rep. 255.  
3 H. & P. 255.  
<sup>f</sup> 2 H. & M.  
577.

<sup>g</sup> Littells Se-  
lected Cases  
26.

<sup>h</sup> Gow on Pt.  
305, 306, 311.  
6 John. Rep.  
144. Chft. on  
bills 57 to 52.  
3 Stark. Ev.  
1076, 1081.



JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

be actual notice to those who have had previous dealings, and proof of publication in a gazette, as to subsequent dealers. The circumstances alleged in the bill from which notice is sought to be implied, are unknown to the law.<sup>a</sup>

<sup>a</sup> 3 Kent Com.  
1 to 25.

<sup>b</sup> John. Ch.  
Rep. 250.

3 Marshall

515. 1 Litt.

17, 396. 1 Atk.

628. 2 Ib. 629.

2 Ves. 12, 618.

1 Ves. jr. 122.

4 Bibb. 451.

3 Atk. 715.

2 H. & M. 391.

1 Peters U.

S. Rep. 146.

Paley on A-

gency 143.

145, 149, 150.

4 Cowen 24.

492. Gow. 59,

66, 70.

2 Strange

850. 10 East

378. 394.

9 Cr. 161.

<sup>c</sup> Paley 11, 35,

200. Note F.

203. 3 Ves.

202. 3 Atk.

294, 392, 650.

2 Ib. 242.

Equity Cases

Ab. 28.

<sup>d</sup> 7 John. Ch.

Rep. 182. 3 Ib.

275. 2 H. &

M. 139.

2 Munf. 1.

<sup>e</sup> 1 Starkie

Ev. 242, 252.

1 Peters U.S.

Rep. 686, 328.

1 Mass. Rep.

299. 5 Litt.

349. 19 Jon.

162. 7 Cr. 481.

3 Wheat. 234.

17 Mass. Rep.

515. 2 Dallas

302. 4 Munf.

241.

<sup>f</sup> 4 Cr. 241.

<sup>g</sup> 7 Cr. 481.

3 Wheat. 234.

<sup>h</sup> 7 John. Ch.

Rep. 303.

As to the ratification, and adoption by the complainant of the acts of John Lucas, adoption is either implied or express: Implied from circumstances, such as community of interest, long silence and acquiescence with full knowledge: Express adoption may be by pleading, &c. and adoption for one purpose is adoption for every purpose.<sup>b</sup>

That John Lucas was a stockholder and director, is no notice to the bank. When he became a borrower, he ceased to be a lender; his interest became adverse to the interest of the bank. Besides, in the case of a corporation aggregate, the knowledge of one copartner, is not the knowledge of the others.<sup>c</sup>

Chancery cannot enter into the merits of the judgments at law,<sup>d</sup> and from the facts shewn, the judgments rendered in Georgia are conclusive.<sup>e</sup> They come within the most strict construction of the constitution and laws of the United States. It is not necessary to inquire into the cases where it is apparent no service or notice was had; and even if it were, embarrassing questions might arise. The presumption is, that every Court is the best judge of its own jurisdiction.<sup>f</sup> This Court cannot supervise nor correct the errors of Courts of other States; the exercise of such power would involve a legal absurdity. It would require that the doctrine of the supreme judicial tribunal of the Union, as laid down in *Mills v. Duryce* & should be overturned; and the construction of the paramount law by that Court, should be binding on all State Courts.<sup>h</sup> The Supreme Court of the Union acts on this principle; it does not presume to construe State laws; the Courts of Georgia are certainly best acquainted with its laws and practices. It is not because of their abstract justice, that the decisions of the Courts of other States should be enforced here, it is because they are *res adjudicata*; and if judgments of other States were merely *prima facie* evidence, and it were necessary again to prove the original consideration, the difficulties on account of absence and death of witnesses and loss of papers, &c. would amount to a denial of justice in many cases.

Then if the judgments in Georgia are conclusive, all the matters of the bill concerning their consideration, fall to

the ground. When the foundation of equity is taken away, all the dependent circumstances become immaterial, and it is unnecessary to inquire if they be answered or not. <sup>a</sup>

JANUARY 1897.

Lucas  
v.  
Bk. of Darien.

<sup>a</sup> 2 Maddox  
838.

<sup>b</sup> 1 John. Ch.  
Rep. 98, 165,  
436. 2 ib. 222.  
4 ib. 566.  
6 ib. 87, 479.

Every one is bound to take care of his rights in due season; and as from the record, it appears the appellant had an opportunity of defending himself, if he failed to do so, it is his own neglect, and under such circumstances equity can afford him no relief. <sup>b</sup> It is to be presumed that if the appellant had a substantial defence, he would have availed himself of it when sued on the seven notes; but instead of this, he takes shelter under the judgments rendered in Georgia, insisting they are good and valid while they protect him, and when they are used against him, he says they are void and of no binding effect. Doctrines which produce such a result cannot be sound, nor can they receive the sanction of any enlightened tribunal.

HITCHCOCK, in reply. If proper parties had not been made, the proper course would be to reverse and remand, so that they might be made; but proper parties are made. The transactions concerning which a discovery is sought, took place between John Lucas and the branch bank; no answer is called for from the parent bank, but an injunction is prayed against the bank of Darien. This was sufficient. By statute, the clerk is required to issue subpoenas against defendants, <sup>c</sup> and it would have been necessary if the parties did not appear, but the bank voluntarily appeared, and twice moved to dissolve the injunction. This is a waiver of process, and should be so considered in a suit prosecuted by a complainant in good faith. <sup>d</sup>

<sup>c</sup> Laws of Ala.  
Dig. 492.

<sup>d</sup> 2 John. Ch.  
Rep. 217.

When a Court of Chancery obtains jurisdiction for one purpose, it will retain it for all purposes, to do complete justice. <sup>e</sup> The defence at law is at least doubtful. The records from Georgia do not disclose who acknowledged service of the writs; it merely appears in the name of "J. & W. Lucas," but by which partner is not shewn by the records. Another ground of chancery jurisdiction is, that the plaintiffs at law are seeking to enforce an unconscionable claim, and to profit by a fraud.

<sup>e</sup> 7 John. Ch.  
Rep. 149.  
17 John. Rep.  
King v. Baldwin.

It is said that the defence at law is not set out; true that is necessary in a bill of discovery, but this is not a bill of discovery. The bill seeks relief, and contains equity. It charges a change of pursuits by the appellant; his removal to Alabama before the legal existence of the bank, and other circumstances which afforded evidence of a dissolu-

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

<sup>a</sup> Campbell &  
Cambrelong  
Dig. 402.

tion of the copartnership. The bank was guilty of gross negligence in not calling for any evidence of the existence of the copartnership under such circumstances, before discounting to so large an amount.

The defendants have not sufficiently answered the bill. A defendant is bound to answer fully, and if he sets up matter of avoidance, such matter must be proved. <sup>a</sup> Where a fact is averred in a bill, and denied in the answer, and the proof is in the possession of the defendant, its production will be required as much as if it was to an affirmative independent fact. A party cannot be required to prove a negative. All the negative facts charged in the bill and which are denied by the answer, should have been proven at the hearing. On an inspection of the answer, it will be seen that each admission is pregnant with a denial. The answer should have stated the circumstances from which the knowledge of the defendant is derived, and should not have stated the conclusions of the defendant; or, it should have expressly admitted or denied facts.

One partner cannot delegate an authority to bind the firm by deed, even though in some cases he might himself have power to do the act.

It is said that by pleading the judgments in Georgia in his defence, the complainant has adopted them. This ground is untenable. It may be remarked that the exhibits are not proven; there is no certificate by the clerk of their verity. But if they were before the Court, it would make no difference. A defendant at law, may plead as many pleas as he thinks proper, and will not be precluded by any of them. A party is not bound by an admission made in the form of a plea, <sup>b</sup> nor can a party avail himself of such an admission made by his adversary. <sup>c</sup> Each plea must stand by itself. <sup>d</sup> The replication of *nul tiel record* was certainly as conclusive on the bank, as the pleas could possibly be on the appellant.

<sup>b</sup> 1 Starkie's  
Ev. 292, 2 ib.  
28.

<sup>c</sup> 1 Starkie's  
Ev. 388.

<sup>d</sup> 1 Starkie's  
Ev. 21. 1 T.  
R. 125.

By JUDGE SAFFOLD. Previous to any examination of the merits of this cause, it is necessary to take a slight notice of the exceptions urged against the regularity and sufficiency of the bill. It is objected, that the bill is fatally defective in not having prayed process against the principal bank, as well as its branch; that all persons having an interest should have been made parties; that praying relief against the agent, does not make the principal a party, and that none can be regarded as a party.

against whom process is not prayed. The injunction appears to have been obtained against the principal bank, for the reason that it was the true plaintiff in the suit at law; and process was issued against, and the discovery sought from the branch, because the contracts were made with it. I recognise as a general rule, in Courts of Equity, that all parties in interest shall be made parties to the suit, that the matter in controversy may be finally settled. Exceptions are allowed to this rule, when such party is not indispensable to a fair and full investigation, and where it is difficult or impossible to reach him. "The rule has been framed by the Courts of Equity themselves, and is subject to their sound discretion. It is not like the description of parties; an inflexible rule, the failure to observe which, turns the party out of Court, merely because it has no jurisdiction over his cause: but being introduced for the purposes of justice, is susceptible of considerable modifications for the promotion of those purposes." <sup>a</sup> In another case, the same high authority has said: "The rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the Courts of the United States, is not applicable to all. In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest, before the Court. But if the case can be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach, as if such person be the resident of some other State, ought not to prevent a decree upon its merits." <sup>b</sup> Also, it has been ruled, that although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail on the final hearing on appeal, except in very strong cases, and when the Court perceives that a necessary and indispensable party is wanting. <sup>c</sup> Here, both the bank and its branch were beyond the limits of the State, so that the difficulty of making either a party, was about the same; it was competent to have made both, or either, a party; and it is not believed that Courts have authority to retain the rule where the rights of absent persons, who may be brought before them, are likely to be prejudiced; and that the bank of Darien, besides being enjoined as plaintiff at law, is directly interested, is entirely evident. If this bill can be sustained on authority, without the bank being regu-

JANUARY 1830.

Lucas

Bk. of Darien.

<sup>a</sup> Mallow v.  
Hind.  
12 Wheat.  
197.

<sup>b</sup> Elmendorf  
v. Taylor.  
10 Wheat.  
167.

<sup>c</sup> The Me-  
chanics Bank  
of Alexandria  
v. Louisa  
and Maria  
Siton,  
1 Peters R.  
306.

JANUARY 1880.

Lucas  
v.  
Bk. of Darien.

larly made a party, I conceive it can only be on the principle that it has constructive notice, by means of the injunction against it, and the process to its branch; that being beyond the reach of process, it has notice, almost or quite, equal to any the Court is competent to give; that it is presumed to be safely represented by its branch as its agent, or more properly, by its general legal representative in all transactions originating in the branch; that the president and directors of the branch, as well as of the principal bank, are constituted a legal and corporate body, and are equally competent to represent the proprietors of the stock, in relation to all contracts made by them. As these contracts were made with the branch, and the facts in contest are presumed to be exclusively in its knowledge, it would appear that justice can scarcely be promoted by requiring the principal bank to be made a party. But the expression of any absolute opinion on this point, under the view I take of the case, is unimportant to the result.

Another objection urged against this bill is, that the nature of the defence relied upon at law, in aid of which the discovery is sought, is not set out. So far as this position is sustained in point of fact, the law is believed to be with the defendant in error. It has been ruled, that "a bill for a discovery and injunction at law, must state some particular matter which the complainant has a right to seek a discovery of, as material to his defence, and without which he cannot proceed to trial. A mere inquiry, because the grounds of the suit at law are unknown, cannot be maintained, being a *fishing bill*." <sup>a</sup> Again, "if a bill seeks discovery in aid of the jurisdiction of a Court of law, it ought to appear that such aid is required. If a Court of law can compel the discovery, a Court of equity will not interfere; and facts which depend on the testimony of witnesses, can be procured or proved at law." <sup>b</sup> And in another case it is said, "in a bill of discovery, for matters material to a defence at law, the nature of the defence at law must be stated, otherwise the Court will not grant an injunction." <sup>c</sup> Could the bill be regarded as one for general relief, the disclosure of the equity would be no less material. The force of this objection must depend on the view to be taken of the matters of equity relied upon by the bill. The grounds assumed are so far stated in the bill, as to give the Court an intimation of the nature of the defence and relief sought. The question is, are they sufficient to authorize Chancery interference; if so, for

<sup>a</sup> Newkirk v. Willett.  
<sup>b</sup> Caines Cas. in Err. 296.

<sup>b</sup> Gelston v. Hoyt.  
<sup>c</sup> 1 John. Ch. Rep. 547.  
<sup>c</sup> M'Intire v. Mancius.  
<sup>c</sup> 3 John. Ch. Rep. 45.

what purpose and to what extent? This will appear from an examination of the assignments of error. JANUARY 1898.

The points relied on by the errors assigned, are: 1. That the defendant below should, on the final hearing, have been perpetually enjoined, inasmuch as the two main grounds of equity are admitted by the answer. 2. In case this assignment should not be supported, then that the exceptions to the second answer should have been sustained. 3. That the exceptions to the first answer, which were overruled, should have been sustained.

Lucas  
v.  
Bk. of Darien.

---

The two main grounds of equity referred to, are understood to be, 1. That prior to the creation of these responsibilities, the partnership between J. & W. Lucas was dissolved; consequently W. Lucas was not bound by any of the acts of J. Lucas. 2. That some of the notes were drawn and others indorsed by T. Fort, as attorney for J. & W. Lucas; and when suits were commenced on the several notes, in the Superior Court of Baldwin county, Georgia, service of the writs was accepted in some instances by J. Lucas, in the name of the firm, and in the residue of cases, by T. H. Kenan, as attorney for the firm; that both Fort and Kenan acted by virtue of powers under seal, executed by J. Lucas, which acts are contended to have been void as against this plaintiff, as also the acceptance of service of the writs by J. Lucas, and that such would have been the case if the partnership had then existed.

These are facts charged, and supposed to have been admitted by the answer. The cause having been set for hearing on bill, answer and exhibits, and the decree of the Circuit Court having been rendered thereon, the present decision must be governed by the same evidence. First, as to the fact of the dissolution, the answer neither denies nor admits the due execution of the instrument purporting to be the dissolution, signed by J. Lucas; but disavows any knowledge concerning it. It however positively and absolutely denies any publication or notoriety of the dissolution, or any knowledge, or any privity of the fact, by the board of directors of the branch bank, if it did take place as charged; and insists that the articles of dissolution, if they can have any effect, can only be operative as between the parties to it; that it cannot affect the bank or any other creditor, for the want of notice, expressed or implied; and it is insisted in argument by this defendant, that to make a dissolution effective, there must be personal notice to those having previous dealings;

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

to subsequent dealers, proof of publication in a Gazette; and that the circumstances alleged in the bill, from which a dissolution is sought to be inferred, are unknown to the law.

6 John. Rep.  
144.

In the case of *Ketcham and Black v. Clarke*,<sup>a</sup> where after the partnership had expired by the terms of its own limitation, one of the partners assigned all his rights, &c. in the partnership stock to the other, and the latter accepted a draft on the partnership, in the name of the firm, it was held that both partners were bound by the acceptance, there being no evidence of any notice of the dissolution, nor any special notice to the party dealing with the firm. In the opinion of the Court it is said, "we ought at least to go so far as to say that public notice must be given in a newspaper of the city or county where the partnership business was carried on; or in some other way, public notice of the dissolution must be given. The reasonableness of the notice may, perhaps, become a question of fact in the particular case. But public notice in some reasonable and sufficient manner must be given, and that will conclude all persons who have had no previous dealings with the firm; or if actual knowledge of the dissolution without such notice, is brought home to the persons dealing with the firm, such knowledge may be sufficient to conclude him. But as to persons dealing with the firm, public notice is not sufficient by the English law. The notice must be specially communicated to such individuals. These rules have been frequently and solemnly laid down as a part of the mercantile law of England on this subject. The necessity and justice of them call loudly for their sanction by this Court, for as Lord Kenyon observes, it would be the hardest measure imaginable upon the creditor, were the law otherwise; for while he supposed he was giving credit to a man having sufficient property to satisfy the whole of his demands, he might be trusting a beggar." Judge Kent<sup>b</sup> expresses his approbation of the rules here given, and says, "the principle on which this responsibility proceeds, is the negligence of the partners in leaving the world in ignorance of the fact of the dissolution, and leaving strangers to conclude that the partnership continued, and to bestow faith and confidence to the partnership name, in consequence of that belief."<sup>c</sup>

5 3 Cowen 38.

<sup>a</sup> See also  
Gow 305 to  
311, and other  
authorities  
cited.

In this case, neither actual notice, nor publication of the dissolution, is charged by the plaintiff; but he contends

JANUARY 1880.

Lucas

v.

Bk. of Darien.

there was constructive notice, from the circumstance of his having removed from the State; and J. Lucas having engaged in the purchase and improvement of real estate in the town of Milledgeville. These indications are too dubious and unsatisfactory to warrant any legitimate conclusion. They are not incompatible with the continued existence of the firm. They may and often do occur during the continuance of such mercantile connections. They are not circumstances from which a legal conclusion can be drawn that the partnership had been dissolved, which was known to have existed, and while the commerce was continued by one of the partners in the name of the firm, as is sufficiently shewn to have been the case with these partners. The partnership could legally have continued after one of them had removed to England. The rule, as already expressed, that notice must be given, or publication made, or knowledge of the dissolution proven, is in all respects reasonable and convenient, and essentially necessary for the safety of creditors. This is a requisition which I consider equally sustained, both on principle and authority; and one we are bound to recognise as the method of dissolving a partnership, so as to affect the rights of indifferent persons; otherwise, real or fictitious partnerships, and secret or feigned dissolutions may, be made engines of the grossest injustice, fraud and oppression.

But it is also contended, that J. Lucas having been a director, the bank was affected with notice of the fact of the dissolution, &c. and therefore the complainant is entitled to a disclosure when he became so; and to all the benefit derivable from his knowledge of any material facts, as knowledge of the same in the possession of the bank; and that on this point the answer is indefinite and insufficient.

The right of the plaintiff to a further disclosure as to the time of J. Lucas being a director of the bank, cannot be material, as the unqualified admission by the answer, that he was a director, must be understood with reference to the time charged. To this it is answered on the part of the defendant, that when J. Lucas assumed the attitude of borrower, he ceased to be a lender; when he became a borrower, his agency was suspended, for his position was adverse to his principals interest; also, that in the case of a corporation aggregate, the knowledge of one corporator is not knowledge to the others. These positions, I think,



JANUARY 1880.

Lucas  
v.  
Bk. of Darien.

are fully sustained by the authorities cited, as well as by the intrinsic nature of the subject. Agents or trustees are incapable of negotiating with themselves, at least by private contract. It cannot be supposed that J. Lucas had any voice in granting the discounts to himself and partner. His agency in the directory was necessarily suspended during this negotiation. The knowledge of one member of a corporation can only amount to presumptive or constructive notice to the others, according to the circumstances of the case; and if it be the fact, that while J. Lucas was offering notes for discount in the name of the firm of which he was represented as a partner, he knew the partnership to have been dissolved, and that he had no authority to sign the partnership name, his situation and motives fully exclude the idea of his having communicated the facts to any others, so that the presumption of notice is entirely rebutted; and from his adverse interest and attitude, the principle of constructive notice cannot apply. I cannot, therefore, conceive that the fact of J. Lucas having been a director or stockholder, or both, during the time at which these discounts were allowed, can have any influence on the question.

The second branch of the plaintiff's first position, brings in question the legality or obligatory effect of the acts of the attorneys, in the execution of the notes and indorsements, and the acceptance of service of the writs.

It is contended that one partner cannot accept service for his copartner, nor bind him by deed or any specialty; also, that when service is accepted, the hand writing must be proved, and that not being shewn here, the Court below had no evidence of the service of the writs in Georgia. If the proceedings in that State cannot be regarded as judgments, constituting either conclusive or *prima facie* evidence of the debts, but on the contrary, are void, then, inasmuch as the records purport judgments, and are the foundation of the suits enjoined, the plaintiff is entitled to relief against them in some tribunal; and unless he has an adequate defence at law, he may expect relief in chancery. That the ordinary and legitimate sphere of mercantile transactions is limited to simple contracts; and that the general power delegated by one member of a firm to another, by forming a mercantile connection, is equally limited; are propositions to which I readily assent. The consequence of which is, that one partner cannot directly bind another by deed; nor can he constitute an agent or

attorney with sufficient authority to bind the partner in any obligation in the nature of a specialty, unless the other has given special authority, or being present, consents by parol or otherwise, except that he may make any fair disposition of the partnership effects, or release a debt to the firm under seal, and make it operate against the whole.<sup>a</sup>

In this case, however, it is not contended that the complainant has been subjected to any immediate obligation by deed or bond, either by J. Lucas, the partner, or by either of the attorneys appointed by him. But it is said that the principles of the objection equally restrained J. Lucas from delegating by power, under seal, the authority to Fort, or Kenan, to sign or indorse the notes or accept the service of writs, or do any other act; that even an act which would be valid against the firm without a seal, if done by the partner, or by agent under a parol appointment, would be void, if executed by specialty. On this point, I think a nice discrimination is required. I take the distinction to be this: that if the bond or deed constitutes the contract, it must be made the evidence of it, and determines the remedy; then this principle applies, because the legal effect of the contract, the power of the remedy, and the rules of evidence are essentially different, the security being of higher dignity.<sup>b</sup> Here the objection relative to the sealed instruments is, that agents acted by virtue of powers created under seal by one of the partners. The only material question is, did those agents act with the consent, or by the authority of the firm. If one partner had power to constitute an agent in any form to do these acts, what injury can result, or how can it be material that the authority was given with unnecessary solemnity? The acts done by the agents are in the same form, and have but the same legal effect, as if the authority had been given in any other way. It is usual and necessary, that partners in merchandize, should have agents or clerks, with authority to represent them generally. The act of signing notes, and giving indorsements in the partnership transactions, is a power falling within the usual scope of mercantile dealings; each party can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and indorse, and accept bills and notes.<sup>c</sup> Hence, I am of opinion, that the appointment of Fort, and his acts, as attorney, in signing and indorsing the notes, are valid, and tantamount to an appointment by both members of the

JANUARY 1830.

Lucas.  
v.  
Bk. of Darien:

a 2 Caines  
Rep. 254, 5.  
Note A. and  
cases there  
cited, also 1  
H. & M. 423.  
19 John. Rep.  
513. 3 Kents  
Com. 24.

b 3 Kent's  
Com. 24.

c Garard v.  
Basse, 1 Dal-  
las' R. 119. 3  
Kent's Com.  
17, & refer-  
ences there  
given.

JANUARY 1836.

Lucas.

v.  
Bk. of Darien.

a 3 Comr 20.

b Pierson v.  
Hooker, 3  
John. R. 68.  
Manhattan  
Co. v. Led-  
yard, 1  
Caine's R.  
192. Note a.

c Henderson  
v. Wild, 2  
Campbell,  
561. 2 Caine's  
Rep. 254.  
Note a.

firm ; and that so much of the power as gave it the character of a deed, was unnecessary and irregular, and ought to be treated as surplusage, which does not vitiate. The authority to Kenan in like manner to accept service of the writs, is more questionable. Perhaps it should be considered a higher trust ; at least the authority is not so necessary or usual in mercantile transactions, and has been sometimes questioned. The cases referred to by the plaintiff's counsel in support of the general proposition, that one partner cannot bind another by deed, prove, as is contended, the insufficiency of such service on the principles of analogy ; that as one partner cannot, without the consent of the other, convey his real estate, or create any lien upon it by deed, he is equally incapable of effecting the same result indirectly, by accepting service of writs in the name of the firm, thereby facilitating the recovery of judgments against it. I cannot, however, admit the analogy in the unqualified sense contended for ; for true as it is, that one partner has not an unlimited authority to bind the firm, yet, it must be admitted, the nature of a partnership involves a trust and confidence in each member, sufficient, according to our polity, to enable a member, by some form of manœuvre to create legal liabilities against the firm, to the most injurious extent, as observed by Judge Kent : " It is settled that each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interest, and is considered to be the authorised agent of the firm. He can sell the effects, or compound or discharge the partnership debts. This power results from the nature of the business, and is indispensable to the safety of the public, and the successful operations of the partnership. A like power in each partner exists in respect to purchases on joint account, and it is no matter with what fraudulent views the goods were purchased, or to what purpose they were applied by the purchasing partner, if the seller be clear of the imputation of collusion." Such disposition may be made even under seal, and is obligatory on the firm ; and on the same principle, a sealed release by one, is operative against the whole.<sup>b</sup> It is also held, that a receipt given by one partner by way of set off, and in discharge of a private debt, is, if there be no fraud or collusion, a bar to an action by the firm.<sup>c</sup>

If it were admitted an available resistance could have been made pending the suits, to the service of the writs

JANUARY 1820

Lucas  
v.  
Bk. of Darien.

in Georgia which purport to have been accepted by Kenan, as agent, or even those by J. Lucas, the question is conceived to be widely different, whether it can be done in the present state of the cases. It is urged in argument, that no injury can result to the plaintiff in error from the delay, because, having no legal service or notice of the proceedings, he had no opportunity to make defence. Whether this charge, that "he had no notice of said proceedings, and did not appear to make defence," is to be construed as a denial that service of the writs was legally perfected, or that he had no knowledge or information from his partner, or otherwise, of the pendency of the suits, the language does not define, but I would incline to the former construction. Under that view, from the facts of the case, the sufficiency of the service becomes a question of law, and in the dubious form of the charge, the answer is deemed sufficient to establish the fact of his having had all the notice or information of the pendency of the suits which was necessary to enable him to make any defence he could, either against the legality of the service, or the merits of the actions. Being out of that state, the writs could not have been personally served upon him, and constructive notice was all that could have been given in that state. The answer to this point is, "that the defendants cannot admit that no service was perfected on said complainant in said cases as charged in said bill; nor can they admit that said complainant had no knowledge of the existence of said suits; but on the contrary, they do know, and have been fully informed, and do verily believe that the said complainant was well apprised of the institution and progress of the said twelve cases in Georgia, and did advise his said copartner John to keep said suits off as long as possible, and consequently was enabled to make any defence thereto which he might deem expedient; and said defendants further say, said complainant has since entirely ratified and confirmed the acts of said John in accepting service as aforesaid, by pleading the same in the Circuit Court of this state, in suits subsequently brought on the same notes."

It is true as contended, the answer would have been more satisfactory, had it stated the grounds or authority for this knowledge, information and belief of the notice; but as the hearing was had and at the instance of the complainant on the bill, answer and exhibits, and the charge is also vague, the answer must be received as the best evi-

JANUARY 1830.

Lucas

v.

Bk. of Darien.

a Laws of Alabama, 454.

b 1 Chit. Pl. 542.

c Le Conte v. Pendleton, 1 John. Cas. 104. See 1 Chit. 542 n. 107.

d ib. 543.

dence on the point. As to proof of the hand writing in the acceptance of the service of the writs, if it were admitted, that at law this proof should be required, I cannot conceive it material in Chancery, where the truth of the fact is fully admitted and charged in the bill, as is done in this case. It furnishes no grounds for the interposition of equity. Relative to the effect of the pleas in bar, the doctrine is, that in suits at law, the defendant may plead as many several matters as he may deem necessary to his defence, so that he be not admitted to plead and demur to the whole, &c. <sup>a</sup> It is substantially the same as the English stat. of 4 Ann. Under it, the decisions have been, that the defendant cannot plead *non assumpsit*, or *non est factum* to the whole declaration, and a tender as to part. <sup>b</sup> Also, it is held, that *nul tiel record*, and *nil debet*, cannot be pleaded together. <sup>c</sup> The defendant, however, is allowed; with a few exceptions, to plead the several different pleas to the same action, though they may be contradictory and inconsistent, as in trespass, not guilty, a justification, and accord and satisfaction, &c. Nor can one plea be taken advantage of to help or vitiate another; for in general, every plea must stand or fall by itself. But when such pleas would create unjust delay, it is said the Court will sometimes rescind the rule to plead double, and compel the defendant to rely on one of his pleas. <sup>d</sup> But were the doctrine admitted *in extenso*, that a defendant may plead any number of distinct pleas, and that each is to be treated as a separate matter of defence, it is not applicable to, or decisive of the question before us. Here the plaintiff has pleaded these judgments in bar of suits brought on the original securities, has thereby adopted them into his use, and has derived a benefit from them, which he is unable, and unwilling to surrender. On the ground of the existence of these judgments, he has defeated a recovery in the former actions, and now to permit him to disavow their validity, would be to enable him to adopt and use, and reject them alternately, as his convenience might dictate, and exclude the merits of the demand in whatever shape presented.

The plaintiff, however, insists, that his bill does not shew there is a judgment in his favor in the suits brought on the notes in this state, and the answer setting it out, is new matter; and if the plea of former recovery binds him, the replication of *nul tiel record*, binds the bank. It is found the bill charges, that "in the year 1822, suits were

brought by the bank on seven of said notes in the Circuit Court of Montgomery, Alabama, and that at March term, 1825, judgments were rendered in his favor; and that subsequently, twelve suits were brought on the judgments rendered in Georgia on the twelve notes," &c. This is deemed a sufficient recognition of the judgments, to constitute an acquiescence in, and adoption of them, and to estop him from denying their validity in equity. It has been adjudged, that where an injunction has been voluntarily dissolved by the plaintiff, or having been dissolved by an order obtained by his agent or solicitor, without his knowledge or consent, but which was afterwards recognised and acted upon by him, the injunction will not be renewed upon his petition, without some new and special reasons, which did not exist when the injunction was originally granted or dissolved. <sup>a</sup> An imperfect right or title, or an invalid proceeding, may be ratified and confirmed by the acquiescence and adoption of the person having the right to avoid them, or by his acceptance and enjoyment of benefits under them. <sup>b</sup> An administrator who goes to trial upon a plea of payment, though in good faith, and not knowing the effect of a finding against him on that plea, on verdict against him, will not be relieved by being permitted to plead *plene administravit*, although he swear that he had a good defence upon this plea. <sup>c</sup> The admissions of a plaintiff, or defendant, will, in general, conclude none but himself, not his co-plaintiff, or defendant, unless they are his partners. <sup>d</sup> The principle that a defendant may plead several pleas in the same suit, and have the benefit of each, separately, has not, it is conceived, a just application to the case, where, in a former suit, the party has pleaded a matter of fact, succeeded in that suit, and enjoyed a benefit from it, and afterwards seeks to avoid the same matter by bill. With respect to the effect of the replication of *nul tiel record*, I am of opinion, equity can deny these defendants nothing on that ground. They profited nothing by it; it was appropriate and necessary to elicit a decision of the Court on the effect of the record; without it, they must have withdrawn the suits and waived the question; the decision was against them, and they have proceeded to abide its consequences.

It is also objected, "that the answer sets up new matter in avoidance of the allegations in the bill; and that those matters should have been proven on the trial; otherwise, all the allegations in the bill may be admitted, and

JANUARY 1836.

Lucas  
v.  
Bk. of Darien.

<sup>a</sup> Livingston  
v. Gibbons, 6  
John. Ch.  
Rep. 256.

<sup>b</sup> 52 H. & M.  
391. 1 Peters'  
U. S. Rep.  
146.

<sup>c</sup> Martin v.  
Santos, 4  
Cowen, 24.

<sup>d</sup> Dan v.  
Brown, *ibid*,  
492. Vide the  
other author-  
ities cited to  
this point.

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

a 1 Wash.  
Rep. 224.

b Payne v.  
Colas,  
Munt. 35.

c 2 John. Ch.  
Rep. 62.

yet be avoided by matter not responsive to the bill, and which would necessarily compel the complainant to prove a negative." I subscribe to the general principle, "that the answer of a defendant in Chancery, is not evidence where it asserts a right affirmatively in opposition to the plaintiffs demand. A case chiefly relied on in support of this objection, is, that of *Beckwith v. Buller et al.*<sup>a</sup> There, the bill was filed against Beckwith, as executor of his father, praying a distribution of his personal estate, and to set aside a deed made by the testator to the executor, for fourteen slaves, upon a suggestion of fraud in obtaining it. The answer denied the fraud, and contended the deed was but a reasonable provision for him, the heir of the family and title, otherwise unadvanced. He further alleged there was little other estate, except a debt due by bond, which his father gave him in his lifetime, as a compensation for his having consented to the sale of a large English estate, which would have descended to him. The Court recognised the general rule as above stated, and said, in such case "the defendant is as much bound to establish his answer by indifferent testimony, as the plaintiff is to sustain his bill; and that it would be monstrous, if an executor, when called upon to account, were permitted to swear himself into a title to a part of his testator's estate;" and in a much later Virginia decision,<sup>b</sup> the same rule was adopted, and a title to real estate affirmatively asserted by the answer, in opposition to the plaintiff's demand, and which had not been advanced or charged in the bill, was rejected for want of other proof.

The extent and application of this rule, though supposed by Chancellor Kent, in 1816, to have been well settled, not only in the English jurisprudence, but equally in our own, has continued to present difficulties, and produce conflict of decision. In the case of *Hart v. Ten Eyck*,<sup>c</sup> the distinguished Chancellor alluded to, expressed his approbation of the rule as explained in a case before Lord Cowper, as early as 1707. In the old case, the bill had been filed against an executor for an account; he answered, that the testator left 1100*l.* in his hands, and that afterwards, on a settlement with the testator, he gave his bond for 1000*l.* and the other 100*l.* was given him by the testator for his care and trouble. There being no other evidence, the answer was put in issue; and "it was resolved by the Court, that when an answer was put in issue, what was confessed and admitted by it, need not be proved, but that

JANUARY 1836

Lucas

v.

Bk. of Daries.

the defendant must make out by proof, what was insisted on by way of avoidance; that there was this distinction to be observed, that when the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, he must prove it," &c. "But if the admission and avoidance had consisted of a single fact, as if he had said the testator had given him 100%. the whole must be allowed, unless disproved."

And Chancellor Kent remarks, "that the distinction in the application of the rule is not between Courts of law and equity, but between pleadings and evidence. If an answer is introduced collaterally, and merely by way of evidence in chancery, it ought to be treated precisely as in a Court of law. If in a Court of law, the plea confesses the matter in demand, but avoids it by other circumstances, the proof of avoidance is incumbent on the defendant; that the same distinction had been lately taken in the case of *Ormsd v. Hutchinson*, before Lord Erskine; \* that when passages are read from an answer which is replied to, and is not an answer to a mere bill of discovery, they are not read as evidence, in the technical sense, but to shew what the defendant has admitted, and which therefore need not be proved; that the only necessary explanation accompanying the rule is, that you must not stop short with a sentence, so as to garble a single fact, but you must read the answer so as to complete the immediate subject to which the defendant is answering." He also refers <sup>b</sup> to the case of *Thompson v. Lamb*, <sup>c</sup> in which Lord Eldon said, "he was clearly of opinion a person charged, cannot by his answer discharge himself; not even by his examination before the master, unless in this way; if the answer on examination states, that upon a particular day he received a sum of money and paid it over, that may discharge him; but if he says, on a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in chancery, for it is a different transaction." To this I have only to remark at present, that it appears to me to be refinement, rather contracted. In the case under review, of *Hart v. Ten Eyck*, the bill required an account of the administration, &c. The defendant answered and exhibited an account, containing charges both in favor of, and against himself; on the debit side of the account, some of the items were not supported by proof, unless the answer was evidence. After an elaborate examination of the principle, the Chancellor

a 13 Vesey 47.

b Note A. 91.  
c 7 Vesey 587.



JANUARY 1836.

Lucas  
v.  
Bk. of Darien.

a Woodcock  
v. Bennet,  
1 Cowen 711.  
and see note  
A. 744.

ruled that the items in the administrator's account, which were without proof should be rejected, as new and distinct matter set up in avoidance. This decree, however, appears to have been reversed on this point in the Court of errors, but this latter decision has not been reported. It is only referred to in a subsequent case. <sup>a</sup> In this latter case the same principle was involved. The complainant claimed the benefit of articles of agreement, which the defendant had in his possession and contended had been rescinded by consent. The bill called him to answer the matters alleged, as to the making the contract, how it was disposed of, when, where, and how the defendant got possession of the agreement, and under what pretences. The defendant answered, that by the consent of all parties, the articles were taken up and rescinded; the seals being torn off by the express consent and agreement, and in the presence of the complainant. This part of the answer was held to be legal and competent evidence, because it was responsive to the bill, and within the discovery sought. The cases may not be strictly parallel; the objection in the case under consideration is perhaps more plausible than in the one last referred to. Here, however, the plaintiff charges as a material allegation in the bill, that at March term, 1825, judgments were rendered in his favor; unless this allegation was intended to imply a former recovery in his favor on the merits, and was offered as matter in bar, it is difficult to define its object, or it would appear to be nugatory. If it was intended as a bar to the defendant's right to prosecute his suit at law, and the latter was required to make answer to the fact of a former recovery, he could not, in justice to himself, admit the fact of a recovery simply, without stating also that the trial was not on the merits; and as he was required to answer respecting a part of the record, which would be indefinite and unintelligible alone, it would appear necessary that he should have described the whole, at least so much as would shew the legal effect of the part charged. I think it entirely equal to an averment that he, the defendant, had received a particular sum of money, and paid it over at the same time, and this expressed in the same sentence, which as it is shewn, has been adjudged proof. The whole force and effect of the judgments in question, are within the scope of the relief sought. I think it may be assimilated to a case in which the defendant is required to answer, if he did not owe a particular sum of money; and the answer is, that he

is under contract to pay that amount, but by the terms of the agreement it is to be paid in a currency under par, or that he did owe the sum, but has discharged the debt. In either of these supposed cases, the effect of the general admission of the charge cannot appear, unless in connexion with the explanation in avoidance. As to the difficulty or necessity of disproving this part of the answer, or the temptation to falsehood in relation to it, the subject is deemed peculiarly favorable to the answer; it refers by exhibiting a copy of the plea, to a record in the same Court, so that the proof was rendered equally accessible to either party, requiring only a reference to the records of the Court in which this suit was tried, for conclusive evidence on the point. The principle is the same in this revising tribunal, that it was in that, and if the proof was sufficient there, it is equally so here. I am also inclined to regard this, rather in the nature of a bill for an injunction and discovery, than for general relief; that its legal effects, so far as can be available, must be to make the chancery ancillary to the law tribunal, by eliciting facts within the knowledge of the defendants, to be used as evidence in the latter. In this view of the case, the objection as to new matter in avoidance, is at least less appropriate than in a case proper for general relief. But another answer to this objection urged for the defendants, is not unworthy of consideration; it is, that their answer has not been legally put in issue. It appears that the cases referred to, in which the sufficiency of the answers as proof of the facts stated, has been denied, have been cases in which the answers have been put in issue, by which I understand, according to the practice in England, and most of the States, the complainant must reply; and although replications with us have been dispensed with by statute, yet I think the intention to contest the facts, must in some way be indicated, and it can be conveniently done according to the practice in some of the States, by setting the cause for hearing on bill, answer and proofs. \* This cause appears to have been set down for hearing, on motion of the plaintiff, on bill, answer and exhibits, or at least, without other proof, or any leave to take testimony, and immediately on the dissolution of the injunction. The defendants may not have sought time or leave to take testimony; had they done so, perhaps they could have obtained it, but the course adopted by the plaintiff implied no intention to put

JANUARY 1830.

Lucas

v.

Bl. of Darien.

\* Vide 7 John.  
Ch. Rep. 223.  
1 Bibb 477.

JANUARY 1830.

Lucas  
v.

Bk. of Darien.

a 2 Wheat.  
380.

the answer in issue, and unless that was to be done, the defendants had no inducement to require other proof.

In the case of *Leeds v. The Marine Insurance Company*,<sup>a</sup> it was ruled that where a cause is set down for hearing on the bill, answer and exhibits, without other pleadings, the whole of the answer must be considered as true; and notwithstanding the difference in the form of practice, the principles of relief must remain in substance, the same. Justice appears to require, that the answer should be admitted or contested before the hearing, and in time for the defendant to procure any necessary proof at command. I am of opinion, therefore, that this objection ought not to prevail. That an answer in Chancery, if free from the objection noticed, is evidence for the defendant, and must prevail, unless disproved by two witnesses, or one with corroborating circumstances, is admitted to be a well settled rule.

It is further argued on the part of the plaintiff, that the judgments obtained in Georgia, on which the suits at law were brought, are void for want of jurisdiction in the Court there; and in support of this position, various authorities are cited; the highest and most recent of which will be noticed. The position rests on the facts already adverted to, relative to the plaintiff's non-residence in that State; the objections to the service of process, &c. from which it is contended, the Court had no jurisdiction of his person. The questions presented are, what is the effect of the judgments and how far is it competent for Chancery to interfere with the remedy sought at law upon them?

It is entirely clear, that the earlier doctrine on this subject has undergone, within the last ten years, important changes in several of the States, and particularly in the Courts of New York. The principle maintained in New York, in the case of *Hitchcock v. Fitch and Aikin*,<sup>b</sup> and in several other cases, and in other Courts near the same time, that a judgment rendered in another of the United States was to be considered in the light of a foreign judgment, and was only *prima facie* evidence of the demand, consequently that in an action of debt thereon, the plea of *nil debet* was good, or that the action might be in *assumpsit*, has been entirely exploded. This has been done mainly by force of the decisions of the supreme tribunal of the Union; and the different principle giving to such judgments, the conclusive effect of record evidence, where the proceedings

<sup>b</sup> 1 Caines 461.

have been regular, the parties and subject matter within the jurisdiction of the Court, and personal notice given, has been fully acquiesced in by several of the Courts, including the Supreme Court of New York, that had held the different doctrine. The same must be done by all other tribunals, as well from the intrinsic correctness of the principle, as the controlling influence to which the Supreme Court is entitled on this highly important constitutional question. In the case of *Borden v. Fitch*,<sup>a</sup> the Supreme Court of New York held a divorce in another State obtained by the husband, when the wife resided out of the State, and had no notice of the proceedings, to be null and void; because the Court pronouncing the decree had no lawful jurisdiction of the case, when it had none over the absent wife. It was considered to be a judgment obtained upon false and fraudulent suggestions, and in *Hanover v. Turner*,<sup>b</sup> the Supreme Court of Massachusetts held a divorce in another State void, as having been fraudulently obtained by one of their citizens, without a change of domicile; and *Judge Kent* remarks,<sup>c</sup> "there is no doubt of the rule, that the allegation that a foreign judgment was obtained by fraud, is admissible, and if true, it will destroy its effect. All judgments rendered any where against a party who had no notice of the proceedings, are rendered in violation of the first principles of justice, and are null and void. All sentences obtained by collusion are mere nullities, and all other Courts may examine into facts upon which a judgment has been obtained by fraud; and that every party is at liberty to shew that another Court was imposed on by collusion." These rules and regulations have exclusive reference to judgments rendered by Courts having no jurisdiction over either the parties or subject matter; and with reference to the latter position, if the learned judge intended to apply the averments of fraud and collusion in trials at law on judgments rendered in a sister State, I think he has ventured against the weight of authority, as will appear from the further examination of the subject. But as the authorities he cites are mainly English, or early American decisions, and are found to refer to foreign judgments, perhaps he did not.

In the case of *Andrews v. Montgomery, et al*,<sup>d</sup> it was ruled, that a judgment fairly obtained in another State, is conclusive evidence of a debt, and that an action of *assumpsit* will not lie on such a judgment. Spencer, Chief Justice, in delivering this opinion, remarked in reference

JANUARY 1830.

Lucas  
v  
Bk. of Darien.

a 15 John. R.  
141.

b 14 Mass. R.  
227.

c 2 Com. 91.

d 19 John. R.  
162.

JANUARY 1820.

Lucas  
v.  
Bk. of Darien.

a 7 Cranch,  
481,

to the decision of the Supreme Court of the United States, in *Mills v. Duryee* <sup>a</sup> "that independent of the consideration that a decision of the Supreme Court of the United States was entitled to the highest respect in all cases, a decision upon provisions of the Constitution was emphatically entitled to their utmost respect; that he considered that Court as paramount when deciding on an article of the Constitution, and an act of Congress, passed under its express injunction; and that whatever might be his individual opinion, he should feel it his duty to surrender it to their controlling authority; that he must however be permitted to say, that the opinion expressed by Mr Justice Story coincided entirely with his own private opinion, and that he never had believed the decision in *Hitchcock v. Fitch and Aikin* to be well founded." The case alluded to, of *Mills v. Duryee*, was on a judgment of the Supreme Court of New York, to which the defendant pleaded *nil debet*, which plea was held bad on general demurrer.

It may be here remarked, that the Constitution of the United States declares "that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and Congress may, by general law, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof;" and by the act of 1790, Congress provided for the mode of authenticating the records and judicial proceedings of the State Courts, and then further declared, that "the records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the State, whence the said records are, or shall be taken." Story, Justice, observed, the decision of the case mentioned, depended altogether upon the construction of the Constitution and law of the United States, as above quoted, "that it was argued that this act provides only for the admission of such records as evidence, but did not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the State Court, whence it is taken. If, in such Court, it has the faith and credit of evidence of the highest nature, viz: record evidence, it must have the same faith and credit in every other Court. Congress

have, therefore declared the effect of the record, by declaring what faith and credit shall be given to it." JANUARY 1830.

In this opinion it was further remarked, in substance, that as the defendant had full notice, no doubt the judgment was conclusive in New York, and must therefore be conclusive in other States; "that whatever may be the validity of the plea of *nil debet* after verdict, it could not be sustained in that case. The pleadings in an action, are governed by the dignity of the instrument on which it is founded. If it be a record conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*; and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences," that the proof by an exemplification of the record is entirely equal to an inspection by the Court, of its own record. The right of the Court to issue execution, depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution. By a majority of the Court, that judgment was affirmed; and this is to be considered a leading case on the doctrine most current at present throughout the United States.

Lucas  
v.  
Bk. of Darien.

The case of *Hampton v. M'Connel*,<sup>a</sup> was, in all respects, similar to that of *Mills v. Duryee*. Chief Justice Marshall delivered the opinion of the Court, and said, they could not distinguish the two cases; that the principle decided by the former, was, "that the judgment of a State Court should have the same credit, validity and effect, in every other Court in the United States, which it had in the State where pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other Court in the United States.

a 3 Wheaton,  
234.

The case of *Shumway et al. v. Stillman*,<sup>b</sup> was debt on a judgment from Massachusetts. The defendant pleaded specially to the jurisdiction of the Court of Massachusetts, that he had not resided in that State; but that he had been, and then was an inhabitant and resident of New York; to which there was a general demurrer. Sutherland, Justice, in delivering the opinion of the Court, observed, "he could not entertain a doubt on the principle; that in an action on a State judgment, it is competent for the defendant to shew by a special plea, that the Court in which the judgment was rendered, had no jurisdiction, either of the subject matter, or of the person;" and to shew that the same

b 4 Cowell,  
292.

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

9 Mass. Rep.  
467.

principle prevailed in Massachusetts, he quoted the remarks of Chief Justice Parsons, in *Bissell v. Briggs*,<sup>a</sup> that "whenever a record of a judgment of any State is produced as conclusive evidence, the jurisdiction of the Court rendering it, is open to inquiry. If it should appear that the Court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment." Against the principle of the plea in the case in New York, the Court thought there was no objection. But that it did not state enough to shew that the Court which rendered the judgment had not jurisdiction of the person of the defendant. They said "every presumption was in favor of the jurisdiction of the Court; that the record was *prima facie* evidence of it, and should be held conclusive, until clearly and explicitly disproved; that the plea in that case might be literally true, and yet the defendant may have been personally served with process," &c. that an inhabitant of one State may, without changing his domicile, go into another; he may there contract a debt or commit a tort; and while there, he owes a temporary allegiance to that State, is bound by its laws, and is amenable to its Courts; that therefore the plea entirely failed in shewing the want of jurisdiction in the Court which rendered the judgment.

<sup>b</sup> In the case  
of Biddle v.  
Wilkins, 1  
Peters' U. S.  
Rep. 686.

The Supreme Court of the United States, as late as 1828,<sup>b</sup> ruled, "that when the Court in which a judgment has been rendered, had no jurisdiction over the subject matter of the suit; or where the judgment on which suit has been brought, is entirely void, this may be pleaded in bar, or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment." And it recognised as a general rule, "that there can be no averment in pleading against the validity of a record, though there may be, against its operation;" and said, "it was upon this ground, that no matter of defence can be pleaded in such case, to a suit on a judgment, which existed anterior to the judgment; that it was sufficient, and had become the settled practice in declaring, only to allege generally, that the plaintiff by the consideration and judgment of that Court, recovered the sum mentioned therein; the original cause of action having passed in *rem judicatum*." At the same time, <sup>c</sup> it was held, that "where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment,

<sup>c</sup> In the case  
of Elliott et  
al. v. Pierces  
et al. 1 Pet-  
ers' U. S. R.  
340.

JANUARY 1886.

Lucas  
v.  
Bk. of Darien.

until reversed, is regarded as binding in every other Court. But if it act without authority, its judgments or orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a recovery sought in opposition to them, even prior to a reversal." This is deemed a sufficient examination of the doctrine, to shew the nature of judgments from sister States; and from which, among others, I think the following conclusions result:

1. That a record of recovery, shewing that a Court of another State has taken cognizance of the matter, is *prima facie* evidence of its having had jurisdiction.

2. That a judgment of a Court of competent jurisdiction is valid, and binding in every other Court, until reversed, or otherwise vacated.

3. That a judgment or order of a Court, having no jurisdiction, is a mere nullity, but the non-residence of the defendant does not deprive the Court of jurisdiction where there has been legal service of process.

4. That a judgment of a Court in one of the States, appearing from an exemplification of the record, certified in due form, is entitled to the same credit, validity and effect in every other Court of the United States, that it had in the State where it was pronounced; consequently, if, in such Court, it has the faith, credit and effect of record evidence, it must have the same in every other Court.

5. That debt is the only proper action on a State judgment, and *nul tiel record*, the only proper general issue in such action; but it is not the only proper plea; for where the Court, in which it was rendered, has not jurisdiction, or when the judgment is otherwise void, this may be pleaded in bar, or may, in some cases be given in evidence under the general issue.

6. That there can be no averment in pleading against the validity of a record, though there may be against its operation.

Then, according to these principles of Chancery, and for the reason that the plaintiff had notice of the process, which, at least, is sufficient, when connected with the circumstance of his having adopted and ratified the recovery by pleading it in bar, and receiving the benefit of it in the former suits, I am of opinion, equity can afford him no relief on the ground of any alleged irregularity in the judgment or proceedings in the Court of Georgia.

With respect to any alleged compromise between the



JANUARY 1830.

Lucas  
v  
Bk. of Darien.

Bank and William D. or J. Lucas, or payments made by William D. or Hunter, the bill only prays a disclosure of the amount of payments made, and of the correspondence between the Bank and J. Lucas, touching the compromise and consolidation of said notes. In answer to which, the defendants make exhibits, which they say are full disclosures of those matters as far as they are known to exist. On this point, it is sufficient to remark, if these disclosures are material to the plaintiff in error, as evidence at law, he can in future avail himself of the full benefit of them. It is understood, however, the compromise is denied by the answer, and by the correspondence it is proved, and it is presumed the payments were susceptible of proof by the attorney who negotiated the settlements and dismissed the suits: if so, Chancery aid is unnecessary, and unauthorised; if not, the prayer for the discovery comes too late; it ought to have been sought pending the suits in Georgia.

But it is contended by the plaintiff, that equity having obtained jurisdiction, will retain the cause to do justice; to which it is replied, that from the disclosures of the answer, the plaintiff could have made his defence at law, while the cases were pending in Georgia; under such circumstances, equity can afford him no relief.

The doctrine is found to be, that a decision of a Court of competent jurisdiction, being *res judicata*, is conclusive and binding on all other Courts of concurrent jurisdiction; <sup>a</sup> that relief will not be granted for the purpose of a new trial at law, where the party lost his opportunity of defence by his own negligence; <sup>b</sup> that where there is neither accident nor mistake, misrepresentation nor fraud, Chancery has no jurisdiction to afford relief to the party, on the ground that he has lost his remedy at law, through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery. <sup>c</sup>

It is not the province of Chancery to revise judgments, or correct errors at law; the jurisdictions are, and ought to remain separate and distinct. Nor will it relieve against a judgment on the ground of its being contrary to equity, unless the defendant was ignorant of the fact in question, pending the suit, or it could not be received as a defence at law, or unless without any neglect or default on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of the defence. <sup>d</sup>

<sup>a</sup> Simpson v.  
J. Hart, 1  
John. Ch. R.  
91.

<sup>b</sup> Dodge v.  
Strong, 2  
John. Ch. R.  
228.

<sup>c</sup> Penny v.  
Martin, 4  
John. Ch. R.  
566.

<sup>d</sup> Foster v.  
Wood, 6  
John. Ch. R.  
87.

Therefore, it would appear from the view I have taken of the subject, that the case presented by the bill, answer and exhibits, does not authorise a decree for any relief; that the circumstances do not create sufficient equity in favor of the complainant; that there is no evidence of fraud, mistake, trust or accident, sufficient to justify the interposition of Chancery, and that if there be any fatal irregularity in the judgments sued on, or if any material discovery of facts has been obtained by this bill, the Court of law, which has, and first had charge of the contest, is the competent and only proper tribunal to adjudicate upon them. On the 2d and 3d points relied on, it is sufficient to add, that there is not conceived to be any material insufficiency in the answers.

JANUARY 1830.

Lucas.

v.  
Bk. of Darien.

The large amount, near \$40,000, contested by this bill, the variety and intrinsic importance of the principles involved, united with the high professional attainments elicited by the discussion, have demanded of this Court a thorough investigation of the subject; and though conscious I have been unable to do it justice, yet the conclusions to which I have arrived, are the best result of my deliberate examination, and a due consideration of the authorities.

I am therefore of opinion, that the decree of the Circuit Court, dismissing the bill, should be affirmed, and in this result, the Court are unanimous.

By JUDGE COLLIER. The object of the complainant's bill is, professedly, to transfer the causes pending at law against the appellant, to the equity side of the Court.

It is no more a bill for discovery than every other bill for relief, which calls upon the defendant to disclose by his answer, facts and circumstances preparatory to such relief. The bill alleges that the complainant is advised he cannot make his defence at law, because of the judgments recovered against him; prays a perpetual injunction, and for general relief. These features, it is conceived, determine its character to be that of a bill for relief. Besides, it has none of the distinguishing characteristics of a bill for discovery, technically so called. It does not state the nature of the defence at law, to enable the Court to judge whether the discovery sought be pertinent or material to the issue. It does not shew whether the complainant believes that he will be able to obtain a discovery of the several matters charged, from the defendant.

JANUARY 1830.

Lucas.  
v.  
Bk. of Darien.

1 John. Ch.  
Rep. 547. 2  
John. Ch.  
Rep. 45. 2  
Caines'  
Cases in Er-  
ror 296.

In some of its statements, it is what Lord Thurlow called a *fishing bill*, in dealing in vague and general assertions, and calling on the defendant to answer them, without shewing their relevancy to the defence at law. In each of these particulars, it is defective as a bill for discovery. <sup>a</sup>

Having determined the character of the bill, the first question that arises is, whether it shews a title to relief in equity. In the distribution of the subjects cognizable by the laws of the country, some pertain exclusively to the courts of law, some concurrently to law and equity, and others exclusively to equity. With regard to the first, equity never interferes; as in the ascertainment of damages for a personal injury. In relation to the second, either Court sometimes acts; as in matters of account; but the Court which first acquires jurisdiction, makes a definitive disposition of the subject; unless some question shall arise peculiarly proper for the determination of the other. The third belongs exclusively to equity; as all cases of trust. Equity interposes its aid, when the defence is difficult or doubtful at law. This difficulty or doubt is not understood as relating to the proof alone, but to the form or nature of the defence also. If it be difficult or impracticable to procure the necessary proof to sustain the legal defence, and the material facts rest alone in the knowledge of the plaintiff, the defendant may elicit from him a disclosure, by exhibiting his bill in equity, in aid of the law forum. But when the defence is full and complete, then equity cannot wrest from it the decision of the cause. The rules which obtain in equity are fixed and ascertained with as much certainty as those which prevail at law; and before a party can legitimately invoke their assistance, he must bring himself within the scope of the principles on which they are founded. Without attempting in this place, to give to these general propositions a particular application, I proceed to consider the bill in its details, not however in the order in which they are presented, but as the assumed equity of the case may seem to require.

If it be true as alleged by the appellant, that he was not amenable to the bank in the Court in Georgia which rendered the judgments against him, it is competent for him to shew that fact in his defence at law; and though the record may shew that service of process was regularly effected, the appellant cannot be thereby foreclosed from proving the reverse to have been true, unless he had ap-

peared, and defended the actions there, which he seems not to have done. The character of judgments rendered in a sister State, has been frequently considered and adjudicated on. In *Mills v. Duryee*,<sup>a</sup> it was held that *nul tiel record* is the only proper general issue in an action of debt upon such judgments. In that case the fact of notice was not controverted, and the proposition established by the Court seems to have been predicated upon the ground that the defendant was advised of the proceedings against him; thereby authorising the inference, that if the defendant was not amenable to the jurisdiction of the Court in which the judgment was recovered, the judgment is not evidence of a character so dignified as to exempt it from attack by other pleas. In *Borden v. Fitch*,<sup>b</sup> the Court say "to give any binding effect to a judgment, it is essential that the Court should have jurisdiction over the person and of the subject matter; and a want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose." In *Andrews v. Montgomery*,<sup>c</sup> Chief Justice Spencer, in delivering the opinion of the Court, says "that this Court in *Borden v. Fitch* did not believe that the decision in *Mills v. Duryee* was intended to be carried so far as to preclude the party against whom it was rendered, from shewing that such judgment was fraudulently obtained, or that the Court had not jurisdiction over the person of the defendant." With these qualifications, we are bound by the authority of that case to consider a judgment fairly and regularly obtained in another State, as full and conclusive evidence of the matter adjudicated. In *Bissell v. Briggs*,<sup>d</sup> Chief Justice Parsons says, "the public acts, records and judicial proceedings contemplated by the constitution and laws of the United States, and to which full faith and credit are to be given, are such as were within the jurisdiction of the State whence they shall be taken. Whenever, therefore, a record of a judgment of any Court in any State is produced as conclusive evidence, the jurisdiction of the Court rendering it, is open to inquiry. If it should appear that the Court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment." Again, the learned Judge says, "if a Court of any State should render judgment against a man not within the State, nor bound by its laws, nor amenable to the jurisdiction of its Courts, if

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

a 7 Cranch,  
431.

b 15 John. R.  
141.

c 19 John. R.  
162.

d 9 Mass. R.  
467.

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

a Cowen,  
292.

b Ante p. 124.

that judgment should be produced in any other State against the defendant, the jurisdiction of the Court might be inquired into, and if a want of jurisdiction appeared, no credit would be given to the judgment." These decisions, in the late case of *Shumway & others v. Stillman*,<sup>a</sup> were considered by the Supreme Court of New York, and recognised as being founded in correct principle. And this Court in *Hunt & Condry v. Mayfield*,<sup>b</sup> were of opinion that the law is correctly laid down in that case.

But apart from express authority, it would seem that upon principle, it was competent for a defendant to avoid a judgment by shewing his non-amenability to the forum that rendered it; unless it appeared from the record that the question of jurisdiction had been directly determined against him. The principle on which judgments are holden to be conclusive, is, that the facts and recitals they contain, are supposed to have been adjudicated by a Court of adequate powers; and were they to continue open to a re-investigation, there would be no end of litigation. This being the reason why judgments as evidence are of a character so conclusive, or evidence at all, it follows that they are no evidence of matters which do not appear to be *res adjudicata*. *Cessante ratione legis cessat ipsa lex*.

In my opinion then, the jurisdiction of the Court that rendered the judgments, is a fit subject of inquiry at law. The relief is there ample, and consequently the assistance of equity cannot be given. If then the judgments are void, there can be no resort to equity; and if valid, the appellant cannot then be heard, because he shews no sufficient reason why he did not defend before judgment. The want of personal notice of the pendency of the actions, can avail nothing, unless for that cause, the judgment be void, which I have already said, can be inquired of at law.

The question as to the conclusiveness of the judgments having been disposed of, and this being the ground assumed why equity shall entertain jurisdiction, I might close this opinion; but supposing such a course to be desirable to the parties, I proceed to consider other points presented, and which may arise in the further progress of the cause.

Though there can be but little difficulty in determining what is a dissolution of a partnership *inter partes*, the older authorities made it somewhat a perplexed question, as it respects third persons. The perplexity is, however,

removed by more recent adjudications, and the question may now be considered as settled. In *Lansing v. Gaine, et al.*<sup>a</sup> *Martin v. Walton*,<sup>b</sup> and *Mowatt v. Howland*,<sup>c</sup> it is held that notice in the public papers is conclusive upon all persons who have had no previous dealings with the partnership. But as it respects those who have had dealings with the concern, during the existence of the partnership, actual notice must be given to them, or facts of an equivalent import must be proved by the outgoing partners, to exempt them from liability on engagements entered into by any of the partners after dissolution. There are several circumstances which would be equivalent to an actual notice from the concern; as the reading from a public paper an advertisement, by which the world were advised of a dissolution; yet the general notoriety of the fact of dissolution is not sufficient where no actual notice has been given, and no advertisement published.<sup>d</sup> The Court of King's Bench, in *Wright et al. v.蒲汉姆*,<sup>e</sup> have recently decided that notice in the *Gazette* is notice to all the world of the dissolution of a partnership. The notices which I have seen of this case, mention it as being so unsatisfactorily reported, as to make it of little authoritative value. The opinion of the Court is sustained by no argument, and explained by no statement of facts; so that it is impossible to say whether or not the action was instituted by one having no dealing with the partnership during its existence. That Court could not design to overrule the whole current of its former adjudications; if it had, it would doubtless have reviewed them, and endeavored to shew that they were not founded on correct principles. I am constrained to believe, that could the facts of that case be known, it would be found to be a suit prosecuted by one having no transactions with the partnership anterior to its dissolution, and that the decision should be considered as settling the effect of a newspaper notice as to such persons, which before was not well ascertained by the decisions of that Court. What I have said may suffice to shew what circumstances are essential to make a dissolution effectual against all persons. I now proceed to inquire whether the statements contained in the appellants bill can be considered as having an equivalent effect.

A change of pursuits cannot be held as tantamount to a notice to all mankind, that the appellant had withdrawn from the firm, and revoked the authority of his partner

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

a 2 John. R.  
300.

b 1 M'Cord,  
16.

c 3 Day's Rep.  
353, and 6  
John. R. 147.

d Peake's  
Cases, p. 42.

e 2 Chitty's  
Rep. 121.

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

---

to pledge his responsibility for engagements in their joint names. It is not unusual for capitalists to adventure their funds in commercial undertakings where they themselves lend no personal agency to promote their success. And it is frequent among mercantile gentlemen to lend their names to their friends (when they have no beneficial interest) that the friend may obtain a more extensive credit, and he whose name is thus lent, is bound to comply with the engagements of his friend, made in their joint names, with respect to those who have no notice of his want of interest.

Nor can a change of residence be held to furnish satisfactory proof of the dissolution of a partnership. It may be thought promotive of the interest of their concern, that the partners should live in different places, and it is by no means unfrequent for them to be concerned in mercantile houses in different countries at the same time. To hold these circumstances, (equivocal at best,) on which the appellant seems to rely as evidencing a dissolution, to have that effect, would be to disregard the rules of law upon this subject, and it would be difficult, if not impossible to say upon what principles such a decision was sustained.

It is insisted by the counsel for the appellant, that though there may have been no sufficient notice of a dissolution as to persons *in fieri* when it is said to have taken place, yet, that notice in a public paper was not necessary to prevent a recovery by the bank of Darien; because it had no legal existence at that time. I cannot comprehend the force of this argument, and the most mature deliberation convinces me that it is not sustainable. With equal justice might it be said that notice of dissolution was not necessary with respect to those who migrated to Georgia subsequent thereto, or to infants who after that event had attained the age of legal discretion; this, I apprehend would not be contended for. The principle of the rule which requires notice, actual or constructive, being general in its application, the rule itself must operate co-extensively. The appellant does not allege a notice to the bank of Darien, of the dissolution of the firm of J. & W. Lucas, and the circumstances examined are not, in my judgment, any notice of that fact.

Upon the hypothesis that as it respects that corporation, the partnership is still continuing. I will now consider whether a partner has any authority as such, to acknowl-

edge service of process in the name of the partnership, or whether he has the right to delegate that power to an attorney appointed by him. The course pursued in England, where service could not be effected on all the partners, by reason of the non-residence of any of them, was to outlaw those who were not served, or distrain the joint effects in that country. The partner who was served, might, however, if he thought proper, enter an appearance for those who were not served, and his act would be binding upon them. <sup>a</sup> In *Taylor v. Coryell & Co.* <sup>b</sup> recently determined in the Supreme Court of Pennsylvania, Judge Duncan, in delivering the opinion of the Court, says "it was formerly considered in our Courts by very eminent Judges, that one partner could not enter an appearance for another to an action. <sup>c</sup> But this is not the law at the present day, and it would be most inconvenient if it were." The learned Judge says again, "it is now held that in an action against several partners, one may enter an appearance for the others; which may in its consequences lead to a judgment against all; <sup>d</sup> and it is certainly most reasonable, convenient and consistent with the general authority of partners." I understand the authority of one partner to appear for his co-partner, to be well ascertained by judicial decision; though it must be contended that there is some opposing authority; and it seems to me, that the principle which sustains this rule, applies with equal force to the acceptance of service of process. The entry of an appearance where there has been no service, is an act more binding in its character, and in fact includes the service of process. Every decision, therefore, which maintains the authority in the one case is conclusive as to its existence in the other. If service is accepted, judgment may still go by default, and the defendant may avail himself of legal exceptions which would be aided by an appearance. Hence I have no difficulty in attaining the conclusion that one partner may acknowledge service of process for the firm.

The right of one partner to appoint an agent to conduct the business of the concern, results unquestionably from the genuine authority of partners. *Tillier v. Whitehead.* <sup>e</sup> And the acts of such agent within the scope of the power given, will be as obligatory on the firm as if done by him who gave the authority. It follows from this proposition, that the acknowledgment of service of

JANUARY 1889.

Lucas  
v.  
Bk. of Darien.

<sup>a</sup> *Nicholson v. Bowdas*, 3 Price, 263, & *Devenyhouse v. Graham*, Ibid, 266. n.

<sup>b</sup> *Gow on Partnership*, Appendix, 483.

<sup>c</sup> *Hills v. Ross*, 3 Dal. 331. (*Dicta of Iredell & Chase, Justices.*)

<sup>d</sup> *Harrison v. Jackson*, 7 T. R. 108, dictum of Dampier, in argument, and *Gow*, in his late Treatise on Partnership, so lays down the law.

<sup>e</sup> 1 Dall. 269.



JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

a Laws of Al-  
abama, 462.

process by T. H. Kenan in the name of J. & W. Lucas, under an authority from John Lucas, is effectual.

As an exception to the general authority of partners, it is a correct proposition that even in the course of their commercial dealings, one partner cannot pledge the responsibility of the firm to a compliance with engagements entered into in the partnership name by writing under seal. This exception is founded upon technical reasons, and on the general policy of the law. Such power, it is said, would have a most mischievous tendency, as it would enable a partner to give to a favourite creditor, a security on the real estate of his co-partner, and for the additional reason that the consideration of specialties is not open to inquiry in a Court of law. The latter reason does not obtain in this country to the full extent. In actions founded on bonds, it is competent for the defendant to impeach their consideration by special plea. \* If the question can here be considered *res integra*, and a fit case was presented, I should be inclined to modify the exception, that it might conform to the reasoning on which it is founded.

The question presents itself: does the power of attorney made by John Lucas under his seal in the name of J. & W. Lucas to Tomlinson Fort, to make or indorse notes in their names, come within the principle of this exception. I frankly acknowledge that on this point I have had more difficulty in attaining a satisfactory conclusion than on any other feature in the cause. The first inclination of my mind was, that the objection did not avoid the notes made under the power, as to the appellant; and that inclination has not been removed by more mature reflection. Though the power be void as to the appellant, it does not necessarily follow that every thing done under its authority is also void, if it be valid against John Lucas who sealed it. Such a conclusion would suppose that a partner in giving an authority to do any act in the partnership name, must employ the name of his co-partner. This is not the law. It is competent for him to give an authority to transact business for the firm without using the firm name. If then the power of attorney to Fort be avoided as it respects its execution by the appellant, it is still obligatory upon John Lucas, and must be considered as an authority from him to make and indorse notes in the name of J. & W. Lucas. The use of a seal does not forestall the appellant in any legal defence to the

notes, or in any degree enhance their dignity as securities for money; they cannot be any thing else than promissory notes, and open to any available exception that may be urged against that species of security.

The proposition that a partner cannot bind his copartner by seal, cannot be carried to every supposable case in which a seal is used. In *Salmon v. Davis*,<sup>a</sup> it is held that a partner may, by writing under seal, release a debt due to the partnership. The principle of that decision is, that the discharge would be equally valid without the use of a seal. In *Buchanan v. Curry*,<sup>b</sup> it is to the same effect. And as the power under seal does not give a right to do an act of a character more obligatory than it would, if divested of that solemnity, the cases just referred to, are in point in principle.<sup>c</sup>

It is argued by the appellant that as John Lucas, who was a director of the branch bank at Milledgeville, was advised of the dissolution of the partnership of J. & W. Lucas, the bank itself had constructive notice of that fact. I am unprepared to accord to this argument any weight. It is unreasonable to suppose that he made any disclosure to the directory which would have rendered his applications for discounts unavailing. Besides, to give the argument any degree of plausibility, we must suppose that as a director, he passed upon his own applications; natural justice, sustained by that delicacy common to the human family, forbids such an idea. With regard to his solicitations for loans, his attitude in relation to the bank was changed, he was a borrower and not a lender, and as he was passive, it was unreasonable that the directors who gave him accommodation should be affected by a constructive notice of any fact which he individually possessed.

If an agent acquire a knowledge of a fact while not in the discharge of his duties as such, but when engaged in other business, his principal cannot be presumed to have that knowledge;<sup>d</sup> and were it otherwise, the doctrine would be mischievous, for then it would be most dangerous to employ counsel of the most practice and greatest eminence. Let this exception be applied. Did John Lucas learn the dissolution of the partnership of J. & W. Lucas as a director of the branch bank? If their connection was really dissolved, he became apprized of it in his individual capacity; consequently his principal did not become affected by notice to him.

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

a 4 Binney,  
375.

b 19 Johns 137.

c 19 John. 537.

d 3 Atk. 294.  
1b. 392, 650.  
2 Atk. 242.

JANUARY 1830.

Lucas  
v.  
Bk. of Darien.

---

α Paley on A-  
gency, 203.

Again: so far as I have been able to gather from authority the reason of presumptive notice, I am of opinion that it is never implied where he who had actual notice, had no right to act in regard to the subject to which it relates. α If in this idea I be correct, it follows that a notice of the dissolution of the firm to any number of the directors, less than a majority of those acting, would not affect the bank; because a minority could not controul its operations. This argument does not conflict with the rule that a notice to one partner is a notice to the partnership, for the reason that each of the partners may conduct the partnership business without the positive consent of the others, but the reason of the rule in that case does not apply to a corporation aggregate, as is obvious from the dissimilarity of the relationship of the individual corporators.

As another ground for the interposition of equity, the appellant insists upon the payments made by William D. Lucas, and his release from further liability on the notes to which he is a party. It does not appear from the bill whether the payments were made before or after the recovery of the judgments by the Bank against J. & W. Lucas; and if previous, whether the appellant has not been allowed credit therefor. If they were made since, he may plead them, and be allowed all benefit at law. If he cannot shew the fact of payments, and the amount paid, by legal testimony, he can compel a discovery from the bank, in aid of the trial at law. In respect to the release, this cannot prejudice the appellant's rights. Though William D. Lucas appears to be the maker of some of the notes, and an indorser on others prior to the appellant, yet the appellant alleges that the proceeds were received by John Lucas. Thus it appears that the name of William D. Lucas was lent to J. & W. Lucas, to enable them to draw money from the Bank; and he could not be liable to them as the maker or prior indorser of some of the notes, because there would be wanting a consideration to support a promise. The release, therefore, of W. D. Lucas, does not entitle the appellant to a hearing in equity.

What I have said in regard to the payments by W. D. Lucas, is applicable to the payments by A. R. S. Hunter.

The judgments cannot be avoided in equity as to the appellant because they were taken against J. & W. Lucas, after the death of John Lucas. The objection, if it be

available, is too technical for equity to notice; but should be pursued in the Court that rendered the judgments.

JANUARY 1830.

Lucas

Bk. of Darien.

With respect to the arrangement between the branch bank and J. Lucas, for an extension of the time of payment of the notes described in the appellant's bill, and the giving of a new note for the aggregate amount, that circumstance cannot in my judgment warrant the interference of equity. If the Court in Georgia had jurisdiction of the person of the appellant, the judgments are valid, and I have already shewn that in my opinion it was competent for his co-partner to give it, though he may not have had actual notice of the pendency of the suits, yet he must nevertheless be bound by the judgments as having a constructive notice through the agent of J. & W. Lucas, or his partner John Lucas, who *pro re nata* was his agent; and could it have availed the appellant, he should have shewn on the trial in Georgia, that a new note was given. Besides it would not be compatible with the principles of equity to give the appellant a hearing for this cause, unless he first pays, or shews a readiness to pay the consolidated note. If it be outstanding, he can *prima facie* sustain no injury. The Court will presume the common law to prevail in Georgia, and consequently, that the bank cannot make any transfer which will prejudice the legal rights of the appellant. But if the appellant deemed it necessary for his indemnity, he could obtain a decree to have the note delivered up to be cancelled, and perhaps under some circumstances equity might enjoin a judgment until this was done, but that Court would never arrest a trial at law for this cause. If the judgments are void, the appellant cannot be heard in equity as already shewn, because the defence is properly at law.

Having examined the material points presented by the bill, I proceed to consider several propositions which were laid down in argument.

It is insisted by the counsel for the appellant, that as the appellee has submitted to answer the appellant's bill, the answer should fully respond to its allegations. This is doubtless a good general rule, but subject to many exceptions; thus if a bill was exhibited alleging an equitable title in the complainant, and praying a discovery of profits, if in his answer the defendant was to deny the title, he need not answer as to the profits, or if to a bill charging a partnership and asking a discovery of accounts, the defendant was to deny the partnership, he need not disclose

JANUARY 1830.

Lucas

v.

Bk. of Darien.

a 1 John. Ch.  
R. 65. 4 John.  
Ch. R. 205, &  
the English  
decisions  
there review-  
ed by the  
Chancellor.

the state of accounts; were it otherwise, the wealth and dealing of every commercial house in the country could be ascertained. So I understand if a bill wants equity, an exception to the answer for insufficiency, would not be allowed to any answer that the defendant might make. In determining upon the sufficiency of an answer, the Court must be guided by the equity of the bill, and not by its formal allegations. Why to such a bill require a full answer? Such a requisition would be ineffectual, and one from which no benefit could result to the complainant, as the Court could not render a decree in his favor. This rule has been so fully considered in New York, that without remarking further upon it, I refer to the cases cited to sustain the view which I have taken. <sup>a</sup>

With respect to the plea of "former recovery," pleaded to the actions brought on the notes in Montgomery, it cannot have any influence upon the defence now attempted to be made to the actions upon the judgments. That plea only tendered an issue upon the fact of the recovery, and not its legality; the apparent regularity of the judgments, and nothing more. The replication to that plea was *nul tiel record*, which limited the inquiry of the Court to the disclosures made by the record. If a plea in one cause be evidence in another between the same parties as an admission of a fact, a question which need not here be determined, it can only be taken as proof of the extent of its allegations, or of the legitimate inferences therefrom. It does not necessarily follow, that because judgments were recovered by the bank of Darien, against the appellant, that therefore, the appellant was amenable to the jurisdiction of the Court that rendered the judgments. On the issue of *nul tiel record*, nothing need or can be inferred, but what the record discloses.

It is insisted by the counsel for the appellee, that the decree of the Court below should be affirmed, because the bank is not made a party to the suit. The bill recites the pendency of the suit at law in favor of the bank of Darien against the appellant, and prays that the bank may be joined from its further prosecution, and that a subpoena *ad respondendum* may issue to the branch. It is a rule well ascertained, that none are defendants, but they against whom process is prayed. <sup>b</sup> This is certainly a convenient rule, and it seems to me the only safe one by which, in many cases, it can be determined who are defendants. The "act to regulate proceedings in chancery suits," passed

b 1 P. Wms.  
593. 2 John.  
Ch. Rep. 245.

1st January, 1823, it is conceived, has no influence upon the question. The first section of that act requires the clerk to issue a subpoena, with a copy of the bill, to the defendant, without furnishing any *data* by which we can know who is the defendant, leaving that to be determined as before.

JANUARY 1824.

Lucas  
v.  
Bk. of Darien.

It is a general rule that all persons interested, should be made parties to a suit in chancery. This is, however, said to be a rule adopted for convenience, and may be dispensed with when extremely difficult or inconvenient to be adhered to. The principle upon which it is founded, is the solicitude of that tribunal to prevent litigation; by making its decrees operate efficiently upon all whose interests are involved, which can only be done by bringing them directly before the Court, that they may have an opportunity of defending their rights. The difficulty or inconvenience of making one a party, must be suggested by the bill, that it may be inquired into. In this case we are not informed why the bank of Darien was not made a defendant. According to the English practice, a locality beyond the jurisdiction of the Court would, in some instances, be a sufficient reason for not making a person in interest a party to the bill. But in this case the appellant cannot claim the benefit of this exception. Where is the greater difficulty in eliciting from the bank an answer to his bill, than from one of its branches? Both are located within the limits of another sovereignty, so that process of subpoena could not be executed on their officers. The same course must have been taken to have obtained the answer of either, and consequently, the argument of difficulty or inconvenience has no just foundation.

Without further considering exceptions to the general rule, I am of opinion that the rule itself may be so particularized as to become universal in its application. By requiring all persons interested in the matter involved in the issue, and necessarily to be affected by the decree, to be brought before the Court, the rights of all parties could be adjusted, and a complete definitive decree made upon the matters in question. Let us inquire whether the rule as thus particularized, embraces the case we are considering. The bank of Darien is the plaintiff at law, and the bill of the appellant is exhibited with the view of defending himself against its actions: the bank then is an essential party,

JANUARY 1836.

Lucas  
v.  
Bk. of Darien.

and directly interested in the issue. In fact, no efficient decree can be rendered without affecting its rights. If the Court were to proceed to decree in favor of the appellant upon the case presented, the decree could be no evidence against the bank, for the palpable reason that it has had no opportunity of being heard.

In my judgment, the branch bank could in no event, be made a defendant as such, though no discovery could be had from the parent institution, unless it was incorporated; it does not appear from the bill that it was a corporation, but it would rather seem that it was an office of discount and deposite, established by the bank under the authority of its charter, for the purpose of extending and facilitating its operations. This supposition is strengthened from the circumstance, that the notes of J. & W. Lucas were sued on in the name of the bank, and before the officers of the branch could have been made parties, the appellant should have shewn that it was necessary, in order to an adjustment of his rights. No necessity appears from the record, it may therefore be fairly presumed that the bank itself was the only essential party, and that the books and papers of its branch were subject to its examination and control.

Although an essential party were not before the Court, if the equity of the case was with the appellant, a dismissal of the bill generally, would not be the proper decree. The Court should decree that the bill stand over for parties, or have dismissed it without prejudice. <sup>a</sup>

<sup>a</sup> Mitford's  
Plead. 145-6  
and 221.  
2 Atk. 51-510  
and 14.  
1 John. Ch.  
R. 437 & 349.  
3 Cranch 220.  
7 Cranch 87.  
1 Peters' U.  
S. R. 304.  
12 Wheaton  
193.

Many points were raised in argument, on which the ulterior progress of the cause at law cannot require an expression of opinion. Others are dependant upon those considered, and fully answered by the view taken of them. I have expressed an opinion upon some topics which I might have forbore to notice, but as they were discussed, and are presented by the record, I deemed it proper to examine them with a view to settle the rules of practice upon the points they embrace; I have been more elaborate than I could have wished, but as the case is in many respects *res integra* in this Court, it is proper that argument and illustration should be employed that it may appear by what reasoning my opinion is sustained, and that a test may, to some extent, be afforded for the ascertainment of its legal correctness. It remains only to declare that in my opinion, the decree of the Court below should be affirmed with costs.

By JUDGE PERRY. The decree of dismissal is assigned for error, and this brings the whole equity of the bill to the consideration of the Court; and from the best examination that I have been enabled to give it, I cannot perceive any sufficient ground for retaining the bill. This bill seeks to transfer the jurisdiction of the suit at law to this Court, and to have the case finally decided here, and the suit at law perpetually enjoined. The first question which arises is, whether the bill shews a right or title to relief in this Court. I am clearly of opinion it does not, and that the complainant cannot be relieved upon the facts stated in it; because the facts, if true, might be used at law. The complainant seeks to be relieved from the effect of the judgments obtained against him in the State of Georgia, and which are sought to be enforced in this State, upon the ground that he had no notice of the pendency of said suits in Georgia; or in other words, that the Court rendering the judgments had no jurisdiction of his person. If a judgment of a sister State can be resisted upon the ground that the Court which rendered the judgment had no jurisdiction over the person of the defendant, it follows as an irresistible conclusion, that a Court of law is the proper tribunal to afford the relief sought in the complainant's bill. The case in 4 Cowen's Reports 292, is full upon this point. It is there decided by the Supreme Court of the State of New York, on a review of all the cases in which the conclusiveness of judgments of sister States was considered, that in an action upon a State judgment, it is competent for the defendant to show by a special plea, that the Court in which the judgment was rendered, had no jurisdiction either of the subject matter, or over the person of the defendant; that to give any binding effect to a judgment, it is essential that the Court should have jurisdiction over the person and of the subject matter; and that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it; that the want of jurisdiction makes it utterly void and unavailable for any purpose; and that the party was not precluded from shewing that the judgment was fraudulently obtained, or that the Court had no jurisdiction over his person; that the Constitution and laws of the United States, declaring that full faith and credit shall be given to the public acts, records, and judicial proceedings of the several States, by each State, only contemplated such as were within the

JANUARY 1830.

Lucas

v.

Bk. of Darien.



JANUARY 1880.

Lucas  
v.  
Bk. of Darien.

---

jurisdiction of the State whence the record comes. Therefore, whenever a record of a judgment of any Court of any State is produced as conclusive evidence, the jurisdiction of the Court rendering it, is open to inquiry, and if it should appear that the Court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment. In like manner, that if a Court of any State should render judgment against a man not within the State, nor bound by its laws, nor amenable to the jurisdiction of its Courts, if the judgment should be produced in any other State, against the defendant, the jurisdiction of the Court might be inquired into; and if a man of jurisdiction appeared, no credit would be given to the judgment.

The whole matter of the bill, as I conceive, being predicated upon the ground that the judgments were conclusive and irresistible in a Court of law. Having shewn, as I believe, that a Court of law would resist the conclusiveness of the judgments, and all the other matters charged in the bill being purely of law cognizance; the complainant's bill was therefore, properly dismissed.

By JUDGE LIPSCOMB, C. J. In addition to the very able opinions that have been delivered, I will subjoin a few suggestions, that to my mind are equally conclusive in favor of the decree. It is a rule that universally obtains, that he who seeks equity, must first do justice. If the complainant has, by his negligence, or by design, participated in practising a fraud, he should remain where the rigid rule of law had left him. There is much in the record before us, to induce the belief, that if the copartnership of J. & W. Lucas has ever in fact been dissolved, that it was a secret dissolution, intended to be used by the partners as their interest might prompt, whilst the community should be deluded by the impression that the firm still continued its mercantile operations. When we are required to believe, that a firm that had been extensively engaged in business, composed of men capable of wielding such weighty concerns, had secretly dissolved in good faith, our credulity is taxed to the utmost stretch. There can be no doubt, whatever may have been the intentions of the parties, that this secret dissolution cannot discharge the partners from any liability incurred by their firm. The complainant seeks to be relieved from the payment of debts contracted in the name of the firm subsequent to this alleged dissolution. His negligence,

to use the mildest term, has subjected him to those liabilities, both in morality and in law. If judgments have been recovered against him on those liabilities, however irregularly they may have been obtained, a Court of Chancery would be acting out of its proper sphere, were it to open those judgments to let in a naked legal defence. The decree of the Chancellor dismissing complainant's bill with costs, is therefore affirmed.

JANUARY 1830.

Lucas.

Bk. of Daries.

Decree affirmed.

Judges CRENSHAW and WHITE, not sitting.

## MARTIN V. TOWNSEND.

The statute of 1818, authorising discontinuances as to joint defendants who are returned not found, in certain cases, extends to actions against joint indorsers.

W. TOWNSEND instituted, in Franklin Circuit Court, in 1827, an action of assumpsit against W. B. Martin and P. Martin, to recover of them as joint indorsers on a note for \$ 560, under seal, made by one Ladd, in 1822. The indorsement was in these words: "we assign the within note to W. Townsend, for value received, June 2, 1823.—W. B. Martin, P. Martin." The writ was executed on P. Martin, and as to W. B. Martin, was returned, "not found." At the return term, the plaintiff declared against P. Martin alone, and discontinued the suit as to W. B. Martin. The defendant, P. Martin, demurred; by the Court the demurrer was overruled, and on a writ of inquiry, the damages were assessed, for which the plaintiff had judgment.

MARTIN assigned for error, that judgment was rendered against him after a discontinuance of the action; he insisted that a discontinuance as to one was a discontinuance as to both, as the statute embraced only bills, bonds, notes, &c. but did not extend to indorsements, which are conditional liabilities only, and of a different nature;<sup>a</sup> that the words of a statute should be construed according to their natural and genuine signification and import;<sup>b</sup> that

<sup>a</sup> Laws of Alabama, 448-9.

<sup>b</sup> 3 Bacon, 380, Wilson's Edit. 15 John. 358. Strange, 258-260. <sup>c</sup> Bac. 392-384.

JANUARY 1830. in this case the Maxim *inclusio unius est exclusio alterius*" applies; and that a new remedy should not be extended beyond what is expressed.

Martin  
v.

Townsend.

a 2 Burrows,  
674. Minor's  
Alab. R. 295-  
360. 3 East.  
482.

HOPKINS, for the defendant, contended that every indorsement is a new bill of exchange, and that indorsements were within the equity of the statute, and within its reason and objects, and the evil intended to be remedied. *a*

By JUDGE CRENSHAW. The error insisted on, is, that the discontinuance as to one defendant operated as a discontinuance of the entire action, and that the demurrer should have been sustained. At the common law it would be error to discontinue as to one defendant, in an action brought on a joint contract against the parties bound by the contract. But the common law is materially altered in this respect by the act of 1818. By that act it is in substance declared, that every joint bond, covenant, bill, promissory note or judgment of a court of record, shall be deemed in law to be joint and several, and that when a writ shall issue against two or more of such joint parties, it shall be lawful to discontinue such action against any of the parties on whom the writ has not been served, and proceed to judgment against the others.

The contract declared on, is a promissory note under seal, and technically speaking, is a bill single, and though the liability of the parties arises from their indorsement, yet they are clearly joint promissors, and conditionally liable to pay the debt according to the legal effect of the bill, and will be considered as parties thereto within the meaning of the statute. But a much stronger ground on which to sustain the judgment of the Circuit Court is, that by virtue of the act of 1812, every indorsement of a promissory note or bill single, creates a bill of exchange, as between the indorser and the indorsee, and that the last indorsers by their indorsement drew a bill of exchange in favor of Townsend, on the makers of the instrument, and the prior indorser, and in contemplation of law, the writ was sued out against them as the joint drawers of a bill of exchange, and that consequently the case comes within the provisions of the act of 1818.

For these reasons, a majority of the Court are of opinion the judgment should be affirmed.

Judge WHITE, dissenting.

JANUARY 1890.  


## WILEY &amp; GAYLE V. WHITE &amp; LESLEY, Admrs.

Three commissioners were appointed by the County Court, to sell land belonging to an estate; two only acted, and sold the land to W. who gave his note, payable to the administrators. The administrators failed to give bond as required by the statute for the proper application of the purchase money, the commissioners made no return of the sale, and no decree of the Court was rendered ordering titles to be made to W. nor for the delivery of the note to the administrators, and several years had elapsed. It was held—

1. That the purchaser could defend at law, although put in possession under the purchase, and not evicted.
2. That such defence was good under the general issue.

THE record in this cause shews, that in October, 1826, in Dallas Circuit Court, White & Lesley as administrators of E. Lane, commenced suit in assumpsit, to recover of T. H. Wiley, L. M. Wiley and T. W. Baxter, composing the firm of T. H. Wiley, & Co. and against M. Gayle, on a note for \$ 910, made by them the 8th of October, 1824, payable twelve months after date, to the plaintiffs, as administrators of Lane's estate. The defendants pleaded: 1st. The general issue; 2d. That the note was given for a lot of land sold by White & Lesley, as administrators, to T. H. Wiley, and that the administrators before the sale, did not comply with the requisitions of the statute in such cases made. 3d. That the lot was sold under an order of the County Court, and that the administrators gave no bond with security for the faithful application of the money arising from the sale. 4th. That the administrators petitioned for and obtained an order from the County Court for the sale of the lot, that it was sold, but that they did not give bond and security for the proper application of the money, &c. and 5thly. That the lot was sold by the administrators, and no commissioners were ever appointed by the County Court to sell the lot. To these several pleas the plaintiffs demurred, and the demurrer was sustained.

On the trial at October term, 1827, under the general issue, the defendants proved, that the note sued on was given for land belonging to Lane in his lifetime; that the plaintiffs were his administrators, appointed in Dallas county; that the land was sold by commissioners as a part of Lane's real estate, under an order of the County Court. The defendants offered to prove further, that the plaintiffs never gave bond, either under the 30th section of the act

JANUARY 1830.

Wiley et. al.

v.

White & Les-  
ley, Admrs.

of 1803, nor the 5th section of the act of 1822, nor under any other act authorizing such sales. That three commissioners, under the act of 1822, were appointed by the County Court to sell the lands belonging to said estate, only two of whom acted; that no report was made by the commissioners, nor either, to the County Court; that no decree was ever made by the County Court, directing a conveyance to be made of the land by the commissioners to the defendants, nor any order directing the note to be given up to the administrators; and that no such bonds, orders or decree are of record in the County Court. To this evidence the plaintiffs objected, on the ground, that Wiley, the purchaser had been put in possession under the sale, and that he was still in the uninterrupted possession of the premises, and by the Court the objection was sustained, and the evidence rejected. A verdict was found for the plaintiffs for \$1058 66 on the note.

The defendants in the Court below, who are the appellants in this Court, assign for error, 1st, that the demurrers to their special pleas should have been overruled, and 2d, that the evidence they offered, should have been admitted.

GORDON, for the plaintiffs in error, argued that the proceedings under which the land had been sold, were void, that the requisitions of the statutes had not been complied with, and that the title of the heirs was not divested, that Wiley had acquired no title either at law or in equity to the lot;<sup>a</sup> that all the commissioners should have joined to effect the sale; it being an authority specially delegated, which must be strictly pursued and executed by the identical persons intrusted with it, and by all of them, and none other or less number.<sup>b</sup> He further argued, that in this case the defence was proper and available at law; and that a purchaser was not bound to receive doubtful or bad titles of the vendor; that the vendors being unable to convey, the purchaser might rescind the contract, and avoid the note; else he would be purchasing a law suit, which he should not be required to do.<sup>c</sup>

THORINGTON, contra, contended that Wiley, the purchaser, being in the uninterrupted possession of the land, could not resist the payment of the price; that here the possession was valuable, and that the failure of consideration must be total in all cases where real estate is the sub-

<sup>a</sup> 3 Wheaton,  
75-80. 11  
John. 625. 4  
Henn. &  
Munf. 444.

<sup>b</sup> Laws of Al.  
328-347. 19  
John. 6. 1  
Caines' Cas.  
26. 6 Wheat.  
119. 4 Wheat  
77. 9 Cranch,  
64. 3 Cowen,  
299-651. Pa  
ley's Philos.  
149. 6 John.  
R. 39.

<sup>c</sup> 2 Kent's  
Com. 367. 1  
Peter's R.  
455-468. 11  
John. 50. 19  
John. 73. 10  
John. 26. 14  
John. 248. 6  
John. 39. 2  
Com. on Con.  
52. 5 Littell,  
247.

ject of the contract, before a defence at law can be made; that the sale by the two commissioners was sufficient, but that had it not been, the objection came too late from the purchaser; that payment is a condition precedent to the vendee's right to a complete title, and that the vendor has the right to perfect the title, if defective, at any time before the actual eviction of the vendee, so as to maintain his contract, even were it shewn the title was defective; and that in all cases, before the contract can be set aside, the vendor must be placed in *statu quo*.<sup>a</sup>

HITCHCOCK, argued in reply. He insisted the sale by the commissioners was a nullity; that where several agents, executors or others, are authorised to do an act, all must join, else their act is void;<sup>b</sup> that the doctrine advanced on the other side did not apply to cases where the sale was made by an administrator; and that such a sale contained no warranty of title.<sup>c</sup>

By JUDGE CRENSHAW. In relation to the several special pleas, the Court are unanimous in the opinion that they were insufficiently pleaded, and that as far as they contain available matter, it might have been given in evidence under the general issue. There was consequently, no error in sustaining the demurrer.

The rejection of the evidence offered, is assigned for error. In the consideration of the case, it becomes material to inquire under what law or act of the legislature, the proceedings in the County Court directing a sale of the lands were instituted.

The act of 1803, contemplates the sale of lands by an administrator in *propria persona*, and authorizes him to make a conveyance to the purchaser in cases where the personal estate is insufficient for the payment of debts. The act of 1818 provides, that the County Court may order a sale of the land when it shall appear to be more beneficial to the estate than to sell slaves. Neither of these acts requires the County Court to appoint commissioners to sell the lands. The act of 1822 enacts, that the executor or administrator, where the personal estate is insufficient for the payment of debts, or when it becomes necessary for the purpose of equal distribution among the heirs or devisees, may petition the County Court for the sale of the real estate, and that in its order or decree, the Court shall appoint commissioners, with directions to sell

JANUARY 1830.

Wiley et. al.

White & Les-  
ley, Admrs.

a 2 Wheat. 13.  
2 Littell, 247-  
71. Minor's  
Alab. R. 165.  
6 Cowen 13.  
5 Cowen, 195.  
2 Kent's  
Com. 369-  
374. 5 East,  
448. 3 Am.  
Dig. 501.  
Sug. on Ven.  
345-7.

b 1 Coke 459.  
c 1 Saund. R.  
479. Sug. on  
Vend. 156-8  
521.

JANUARY 1830.

Wiley et al.

V.  
White & Les-  
ley, Admsrs.

the estate, and to report to said Court within the time limited, in the order or decree; and that on the report of the commissioners, the Court shall render a final decree, directing them to convey the estate to the purchasers. This being the last act on the subject, and giving ample authority to the County Court to order a sale of the real estate of testators, and intestates, whenever it becomes necessary, either for the payment of debts, or for the purpose of equal distribution, and these also being cases of frequent and ordinary occurrence, it is fair to presume, that the proceedings in the County Court were had under the act of 1802. But the record itself furnishes satisfactory evidence, and shews clearly, that the proceedings were under the act of 1822. For it is stated in the bill of exceptions, that the defendants offered to prove commissioners were appointed to sell the lands; that they did not report to the Court, nor did the Court make any final decree directing them to convey to the purchaser. All of which are made necessary requisites by this act, but are required by no other act within my recollection.

Being satisfied then, that the proceedings in the County Court were instituted under the act of 1822, without inquiring whether former acts on the same subject are superseded by the provisions of this act, the next question arising is, was the evidence properly rejected?

I lay it down as incontrovertible, that the County Court is a Court of special and limited jurisdiction; that its authority to order or decree the sale of the real estate of testators and intestates, is not derived from the common law, but is created by statute, and to render the sale valid, all material requisitions of the statute must be complied with. In the case at bar, were all the material requisitions of the statute complied with? One very material requisition of the statute, as has been already shewn, is, that the commissioners shall make their report to the Court, on which the Court shall make its final decree, directing them to convey to the purchaser. In order to give effect to the proceedings of the Court, and reality to Wiley's title, this was essential, but which was not done, and the omission is fatal. Wiley's title therefore, was wholly defective and void, unless the omission can yet be supplied so as to complete it.

If the title can yet be made perfect, it must be either by the Court from which it is derived, or from the aid of a Court of equity. I apprehend that the County Court,

from which the title is derived, is incompetent to the task; because years have elapsed beyond a reasonable period of time since those proceedings were transacted in that Court, and it is now too late to call on the commissioners to make their report, or for the Court to make its final decree directing them to convey the land to the purchaser. The statute requires the commissioners to report to the Court within the time limited by the order of sale, and the Court cannot now compel the commissioners to make their report, who in all probability, are dead. Nor can a Court of equity lend its aid, because the statute gave jurisdiction to the County Court, and that Court having first got possession of the subject of litigation, it was competent to a final decision, and to have caused sufficient titles to have been made to Wiley. The title, therefore, is totally defective and void.

JANUARY 1880.

Wiley et al.

v.  
White & Les-  
ley, Admrs.

Apart then, from the circumstance of Wiley's being put in possession under the sale, there was an entire failure of consideration; and if the consideration has totally failed, Wiley ought not to be compelled to pay the purchase money.

Wiley purchased the land, and not the possession, which formed no part of the consideration, and it was not incumbent on him in order to resist the payment of the money, to offer to place the vendor in *statu quo*, or to be evicted by a title paramount, when the title was totally defective, and there was an entire failure of consideration. It seems that this principle applies in cases only where there is a partial failure of consideration, or where it is possible for the vendor yet to make good the title, or when the vendor has covenanted for a good title with the vendee. But it can have no application where a bad title is derived through the medium of a Court of competent jurisdiction, and without a possibility of making that title good. If he has enjoyed the benefit of possession, he may be evicted by the rightful owner, and will be accountable for the rents and profits. I am further of opinion, that the administrator had no right to sue on the note before he had given bond, with security to the Court for the faithful application of the money arising from the sale, unless there had been a decree requiring the commissioners to make a conveyance to Wiley, the purchaser, which would pre-suppose the bond had been given.

For these reasons, the Court are unanimous in reversing the judgment and remanding the cause.

Judge TAYLOR presided below, and did not sit.



JANUARY 1830.  


## AYRES V. MOORE.

Where the vendor remains in possession of personal property sold, it is not sufficient as against creditors, that the consideration be bona fide, and the bill of sale recorded. It must appear that the sale was not made to hinder or delay creditors; and this is to be determined by the jury from all the circumstances.

WILLIAM MOORE, in 1827, instituted an action of trespass against Ayres, in Jefferson Circuit Court, for taking and conveying away a negro boy, named Tom, which he claimed as his property. Ayres pleaded not guilty, and also, in justification, that he had, as sheriff of Jefferson county, levied on the slave, as the property of James B. Moore, by virtue of an execution against him. At the trial at March term, 1828, a verdict was found for the plaintiff for \$210 damages. Ayres took a bill of exceptions, and by writ of error, brought the cause to this Court.

The bill of exceptions shews that the plaintiff below, W. Moore, relied on an absolute bill of sale of the slave, made to him by J. B. Moore, under seal, in March 1825, for the consideration of \$225, which W. Moore undertook to pay for J. B. Moore, at Christmas, 1825, and which he duly paid. The bill of sale was recorded in July, 1825. The sale took place at the house of the vendor, when the slave was delivered by putting his hands into the hands of the purchaser, who afterwards went home, leaving him in the possession of the vendor. About six weeks afterwards, W. Moore took the boy home, and during six more weeks, he went backwards and forwards, from the house of W. Moore to that of James B. Moore, but remained mostly with James B. After this time, he was permanently retained by the purchaser. Ayres offered in evidence another mortgage, subsequently made by J. B. Moore, of the same negro, to one Britain, who forcibly took possession of the boy and retained him twelve months, after which his debt being satisfied by J. B. Moore, he surrendered him to the two Moores, and he again went into the possession of W. Moore. He further proved that an execution in favor of one Roberts, against J. B. Moore, who was insolvent, came to his hands in November, 1826, and another one on the

JANUARY 1830.

Ayrès  
v.  
Moore.

same judgment in September, 1827, on which last he levied on the slave and sold him as J. B. Moore's property. The counsel for Ayres requested the Court to instruct the jury, that "if they believed the possession did not accompany and follow the bill of sale from J. B. Moore, to the plaintiff W. Moore, at the time of its execution, that then the said bill of sale was fraudulent in law, as against creditors and subsequent purchasers." This charge the Court refused, but instructed them, "that if they believed the consideration of the bill of sale was *bona fide*, and that it was recorded within six months after its execution, it was good and valid in law; though the negro remained in the possession of the vendor, James B. Moore, previous to that time."

BARTON and PECK, for the appellants. The instruction given was erroneous; a *bona fide* consideration, means only a valuable consideration, and the transaction may be fraudulent as to creditors, notwithstanding a valuable consideration be given, for it may have been entirely inadequate; or even if equal in value to the property, yet the sale itself may have been made in bad faith; that is, with intent to hinder or delay creditors; the price being more easily secreted from creditors than the property. The intention of the parties should therefore have been left to the jury, that they might inquire if they were honest. Again, though a full price may have been given, yet the real inducement and moving cause for the sale may have been enmity to the creditor, and the sale made for the express purpose of frustrating the creditor, and if so, by the statute, the sale is void. By the instruction given, immaterial how small or inadequate the consideration, yet if valuable, or in the language of charge, *bona fide*, the purchaser must succeed, to the prejudice of honest creditors; or if equal to the value of the property, however fraudulent or villainous the intentions of the parties, yet they stand protected. By the bill of exceptions it appears that no explanation was given why the property was suffered to remain in the possession of the vendor. This matter unexplained, renders the whole transaction in law fraudulent.<sup>b</sup>

a 5 John. R.  
258.  
2 Cowen, 431:

b 2 Cow. 431.  
2 Bos. & Pul.  
59. 8 John.  
446, 9 John.  
197-337.  
Cowp. 434:  
2 Term R.  
567-594. 1  
Cranch. 316.  
Laws of Ala.  
244-5.

SHORTRIDGE & ELLIS, for the appellee.

By LIPSCOMB, C. J. It is not material in disposing

JANUARY 1830.

Ayres  
v.  
Moore.

α Ante, p. 54,

β 2 Cow. 431.

of this case, that we should notice the many points in detail made by the counsel for the plaintiff in error in his very able and learned argument, embracing a review of our statute of frauds, and its analogy to those of Elizabeth and of Charles. It will be sufficient for the present to examine a part of the charge of the presiding Judge, as presented by the bill of exceptions. The Judge charged the jury that if "they believed the consideration of the bill of sale was *bona fide*, and that the same was recorded within six months after the execution thereof, it was good and valid in law, though the negro remained in the possession of the vendor previous to that time." In this charge the presiding Judge is supposed to have erred. The case of *Hobbs v. Bibb*,<sup>α</sup> decided at the last term of this Court, presented this question: is the possession remaining with the vendor after an absolute sale, a fraud *per se*, or only a badge of fraud? It never was contended, but that such possession remaining unbroken with the vendor, was at least a circumstance from which fraud must be inferred, if it was not explained. In that case, it was ruled on much consideration, that it was not fraud *per se*, but a badge of fraud. Many circumstances might doubtless be given in evidence, to satisfy the jury, that a transaction was perfectly fair, honest and harmless in its operations, although the possession had not been changed. In the case of *Bissell v. Hopkins*,<sup>β</sup> Chief Justice Savage thought the circumstance of the horse being necessary to the vendor or mortgagor in finishing his crop, important in explaining why the possession remained with him. In like manner, it would have been competent to have explained away the inference of fraud in the case under consideration, by proving that the boy was too young to render any service to the vendee, and that he had been permitted to remain with his family during his tender years, or that it was not, from the circumstances of the case, at all convenient to take him home. And what was still more important, that the sale was publicly known, and that no person had been deceived by such possession remaining unchanged. If the jury were satisfied that the presumption of fraud had been sufficiently explained and rebutted, and that no person, who had used ordinary prudence, had been deceived, then they should have found for the plaintiff. It is not sufficient however, that the consideration be *bona fide* paid, if the purchaser knew that the sale was made with a view to defraud creditors, although the pos-

JANUARY 1839.

Ayres  
v.  
Moore.

---

session had been changed; nor would publicity in such a transaction give it any additional validity. If the law had required a bill of sale to be recorded, the record, when made, would be sufficient notice of the fact of the existence of such bill of sale; but it would still remain with the jury to be satisfied from the circumstances that it was not fraudulent, if the possession remained unchanged. The objection to the charge given is, that it might be true that all the facts embraced in the charge, had been proven, and yet, that it would not constitute a legal title against subsequent creditors or purchasers for a valuable consideration. The law not requiring bills of sale of personal property to be recorded, the record could not of itself be notice. And if notice had been given to all the world, and the consideration was ample and *bona fide* paid, if it was made with a view to defraud creditors, and such design was known by the purchaser, the title would be void. We think then, that the charge of the Court limited the inquiry of the jury to two facts, not sufficient of themselves to constitute title and to remove the presumption of fraud arising from the possession remaining with the vendor, and that the judgment must be reversed, and the cause remanded.

By JUDGE SAFFOLD. This case involves a question deeply affecting the commercial interest of this and other countries; one on which the opinions of Courts of high respectability have varied, and on which my own opinion does not strictly accord with the views entertained by some of the other members of this Court; and as this is the first opportunity I have had in this Court, I avail myself of it, to express my separate views on the question, though we are unanimous in the conclusion respecting this case.

It may be doubted whether the exceptions, as taken and allowed, fully explain the instructions given. It is probable, from the language employed, that the idea conveyed, or intended to have been, was so far different, as to have informed the jury if the consideration was sufficient, the contract *bona fide*, and the bill of sale recorded within the time mentioned, the fact of the vendor having remained in possession for some time thereafter, did not, by legal construction invalidate the sale. This presumption is strengthened from the opposite nature of the instructions prayed and refused, that the circumstance of

JANUARY 1830.

Ayres  
v.  
Moore.

a Ante, p. 54.

the possession remaining with the vendor, after the absolute sale, constituted fraud *per se*. The record however, must be disposed of in the form in which it is presented. The recording the bill of sale, admitting it to have been immaterial, could operate no prejudice to any one. If, therefore, the charge could be construed as attaching no particular importance to it, and as giving only the instruction, that the want of possession did not avoid the sale, the opinion would have the sanction of the late decision of this Court, in the case of *Hobbs v. Bibb*.<sup>a</sup> But according even to the principles of that decision, the charge, as expressed in the exceptions, if sustained, would tend to mislead, and farther increase the temptation to fraud. It would protect every bill of sale, if recorded, and founded on a valuable consideration; regardless of the deleterious consequences to society arising from secret contracts for moveable and fluctuating property, and titles vested in others than the ostensible owners; or of whatever fraudulent intent or purpose in the contracting parties, or prejudice to those who may have given credit or delayed their remedy on the faith of the apparent ownership. It would also deny the jury right to infer fraud from the most suspicious circumstances; and with others that of a failure to transfer the use and possession, however inconsistent with the nature and avowed object of the contract; which circumstance alone, has uniformly been adjudged a badge of fraud by many tribunals of the highest authority.

The suppression or detection of fraudulent conveyances is difficult, and often impossible under any system; and under the principles of the decision in *Hobbs v. Bibb*, I anticipate the greatest injustice in many cases. Whether the evils would be equal under the contrary doctrine, does not admit of as full demonstration by language, as from practical observation. Yet it will be admitted, that fair dealers would find no difficulty in avoiding that an insolvent person should, with their consent, have the use and possession of their honest acquisitions, under a contract absolute in its nature and terms and importing a contrary possession; and when there is no moral or physical incompetency in reference to the parties or subject of the contract. Nor would there appear to be any unreasonable rigor in a rule that would require of others, when it becomes necessary for any legitimate purpose to deposit or leave their chattels in the possession of one who may gain a spurious credit on the faith of them, to express in the bill of

JANUARY 1830.

Ayres.  
v.  
Moore.

---

sale, or other evidence of the contract, the agreement respecting the possession and the object of it. Then the motive alone would be subject to scrutiny; the rule if adhered to, would soon be understood as well as other principles of law; and that it would aid the cause of justice, can hardly be doubted.

Contested facts on issues of fraud, as well as others, are proper for the consideration of juries; but "fraud is a question of law, when the facts are ascertained;" and whenever a contrary doctrine shall have been riveted on the community by judicial decisions, a great and momentous change will have been effected in the jurisprudence of the country. When it shall be conceded that a fraudulent debtor, who can negotiate a private understanding with a friend to that effect, may execute an absolute conveyance of his property, prove a valuable consideration passing between them, and retain his property in despite of creditors; that he may thus enjoy his property, unless the creditor can be so fortunate, under the covert agreement, as to unmask the artifice, and make proof to the satisfaction of a jury, that the consideration has been returned, or otherwise, that the contract was in fact designed to operate as a fraud on creditors; then it will appear, that the most matured legal doctrines of many of the most enlightened ages and countries, have been but visionary phantoms; that a host of English Judges, who have illumined half the globe; that the entire Federal Judiciary of the Union; together with the Supreme Courts of two thirds of the States, have long been in gross delusion; and that lately, Chief Justice Savage, and his associates and reporter, have kindled a new light of instruction, more dazzling than any produced by the few who had preceded them on that side of the question.

The case to which we are thus indebted, is that of *Bissell v. Hopkins*.<sup>a</sup> The facts were, that a debtor executed a bill of sale for a horse and other articles, to Hopkins, to provide for the security and payment of a pre-existing debt. It was expressed, that the articles should be appraised by a person named; and upon payment being made in the articles, or otherwise, the surplus and remaining articles should be released. The appraisal took place next day, at less than the debt due, and was then indorsed on the bill of sale by the appraiser. Thus the contract stood for fifteen months, when another settlement took place, at which a balance was struck of a less amount

<sup>a</sup> 2 Cowen,  
431.

JANUARY 1830.

Ayres  
v.  
Moore.

remaining due. Then the debtor executed another instrument to the same creditor, on the same paper, mentioning the balance, and agreeing that so much of the property "as remained on hand," should remain liable; and that the horse, which remained on hand, "was to remain for the present," with the debtor. During all this time, the property had remained in the possession and use of the vendor, by the permission of Hopkins. At the time of the first contract, the vendor was indebted to other persons, and one of them, Bissell, about six months thereafter, sued him and obtained judgment; and a few days after the second agreement with Hopkins, issued out execution, and directed the sheriff to levy on the horse in the vendor's possession. The horse was sold by the sheriff to Bissell, who had notice before the sale, (and as the Chief Justice thinks, probably before he sued,) of the claim of the vendee. The question of the right of property arose in an action of trover, by *Hopkins v. Bissell*, in which a recovery was had by the plaintiff, and the judgment was affirmed in the Supreme Court.

Here, it is true, the language of the Court embraces the contested doctrine; for the Chief Justice says, in reference to a contrary decision by Chief Justice Kent, in the same Court, "that the learned Judge, no doubt, intended to say, as in *Barron v. Paxton*,<sup>a</sup> that possession continuing in the vendor, is only *prima facie* evidence of fraud, and may be explained. The question is, in every case, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors."

But the more essential principles of the doctrine were not necessarily involved in that case; the avowed object of the contract, as shewn by the expressions of the instrument, was to secure the payment of a pre-existing debt; and was so considered by the Court who decided it; for the Chief Justice says, "the bill of sale was clearly a mortgage, payable on demand, and I can see no grounds for the imputation of fraud in fact; nor do I conceive the facts such as to constitute legal fraud. It is very distinguishable from *Twyne's case*."

He takes no notice of the cases of *Edwards v. Harbin*,<sup>b</sup> of *Hamilton v. Russell*,<sup>c</sup> or scarcely any of the numerous cases in either country, in which the doctrine of constructive fraud is maintained. Nor does he lay any stress on the distinction usually admitted between absolute and conditional sales, such as was taken in the leading

<sup>a</sup> 5 John. 261.  
<sup>b</sup> 2 T. R. 587.  
<sup>c</sup> 1 Cranch, 309.

case of *Edwards v. Harbin*, "that if the vendee took an absolute bill of sale, to take effect immediately by the face of it, and agreed to leave the goods in the possession of the vendor for a limited time, such an absolute conveyance, without the possession, was such a circumstance *per se*, as made the transaction fraudulent in point of law." Yet, that if the want of immediate possession be consistent with the deed, as it was in the case of *Bucknal v. Roiston*,<sup>a</sup> and *Cadogan v. Kennet*,<sup>b</sup> and as it is, if the deed be conditional, and the vendee is not to have the possession until the condition is performed, the sale was not fraudulent, for there the possession accompanied and followed the deed, within the meaning of the rule. The essential principles of the doctrine were recognized by Judge Buller, in the case referred to, and have been admitted by most of the subsequent decisions, in maintaining the existence of constructive fraud; that there is a necessary distinction between deeds and bills of sale which are to take effect immediately, and such as are to take effect at a future time, or on a future event; that the possession must not be inconsistent with, but subservient to the object of the contract, and that this is all that is meant by the rule, that the possession must accompany and follow the deed. Pursuing this idea, Judge Buller remarked, "we are all of opinion that if there be nothing but the absolute conveyance, without the possession, that, in point of law, is fraudulent." Chief Justice Marshall, in the case of *Hamilton v. Russell*, after reviewing the decision by Buller, observes, "this Court is of the same opinion. We think the intent of the statute is best promoted by that construction; and that fraudulent conveyances which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented, by declaring that an absolute bill of sale is itself a fraud, unless possession "accompanies and follows the deed." This construction, too, comports with the words of the act; such a deed must be considered as made with intent to delay, hinder or defraud creditors." This latter decision was made under a Virginia statute, considered similar, in respect to fraudulent conveyances, to the acts of 13th and 27th *Elizabeth*; all which were at that time, as they have uniformly been elsewhere, adjudged only declaratory of the principles of the common law. The statute of this State is substantially the same, and entitled to the same construction.

JANUARY 1830.

Ayres  
v.  
Moore.

a Prec. in Ch.  
285.

b Cowp. R.  
432.



JANUARY 1830.

Ayres  
v.  
Moore.

It is shewn that the case of *Bissell v. Hopkins*, embraced a bill of sale, the object of which did not require immediate delivery of the property; the chief inconsistency was that the first contract purported a delivery of the property, which was not intended; but the second agreement, and which preceded the creditor's lien, was free from this objection. It expressed, that the vendor was, for the time, to retain the possession, and explained as the former had done, that the motive was the security of the debt. Thus it appears, that the result of the decision is reconcilable with the more current doctrine; so far at least, as to place the case on its own peculiar merits; and that it is distinguishable from the leading cases in which the doctrine of constructive fraud has been sustained.

The reporter has subjoined to that case, a note in which he has enumerated a variety of exceptions to the rule; a sufficient number, as he thinks, to destroy it. This effort has been elaborate and ingenious; but to such as have taken the trouble to examine the supposed exceptions, and test them by the true rule, they will appear less imposing. Exceptions are the consequence of all general rules, and do not necessarily impair their value. Several of the reporter's collected cases are entirely consistent with the rule, not, however, according to his assumption of it, "that unless a change of possession follows immediately, it is not only evidence of fraud, but *per se* makes the sale fraudulent and void." The rule as recognized by the cases already cited, of *Edwards v. Harbin*, and *Hamilton v. Russell*, and also of *Dawes v. Cope*, to which he refers for it, is in substance, only that the possession shall not be incompatible with the object of the deed, or that it shall be consistent with its spirit and intent.

• 4 Binn. 265.

Public sales, whereby notoriety is afforded of the change of title, and the proceeds are once applied to the benefit of creditors; or where, at least, the sale is made through the agency of an officer, so as to furnish indifferent evidence of the motive of the transaction, are, I think, on principle and the best authority, to be viewed in a different light, and must depend on the existence of fraud *in fact*. Nor can there be any doubt of the propriety of withholding the application of the rule of possession where the reason of it more obviously fails, as where the creditor is knowing and assenting to the terms of the sale; where

JANUARY 1830.

Ayles  
v.  
Moore.

the conveyance being free from other objections, is in the nature of a marriage or family settlement; where a change of possession is impracticable, or repugnant to the vendee's right or interest, or where it is inconsistent with the purpose, as in case of an assignment by an insolvent to a trustee who advertises the sale immediately for the payment of all the creditors; where the possession is concurrent or doubtful, it may become proper for the consideration of the jury. The cases here enumerated are conceived to embrace identically or by analogy, most of the collected exceptions to the rule, admitting the farther exception of conditional sales, and which furnish a large portion of the reporter's collection, but which, as I will presently attempt to shew, form a distinct class, depending on different principles.

It may however be here remarked, that several of the decisions relied on by the reporter, must be questioned; among others the case of *Brooks v. Powers*.<sup>a</sup> The sale of the oxen by the tenant to his landlord, in payment of the rent, under an agreement that the former, a debtor, should retain the possession and use of the oxen to carry on his farm, and the fact that they did so remain, until seized under attachment, was a fraud in law, unless protected by a statute favorable to landlords; and the case of *Howell v. Elliott*,<sup>b</sup> where an absolute bill of sale for a horse, was taken as a security for a debt, and the property, after having been left with the vendor, and so kept for six years, was seized on execution by another creditor; the Court decided that such a transaction was only presumptive evidence of fraud for a jury, and the jury having found no fraud in fact, the verdict was sustained. If this was not a fraudulent sale, both in law and fact, it is difficult to imagine one. Perhaps such cases as these should be considered, not as done by the reporter, as exceptions to the rule of fraud, but as exceptions to the learned decisions of the Courts in which they were rendered. With respect to conditional sales, though highly respectable tribunals have applied, and continue to apply this doctrine indiscriminately, even to mortgages, yet I cannot conceive such application authorised either by the leading cases or the principles of reason or necessity, only so far as the reason of the rule affects them by analogy. I take the reason of the law to be, that the continuance of the vendor in possession after a sale, importing a transfer of possession, tends to give the vendor a false credit, and

<sup>a</sup> 15 Mass. R.  
244.<sup>b</sup> 1 Badger &  
Dev, 76.

JANUARY 1830.

Ayres  
v.  
Moore.

a 1 Vesey, 348.

b 1 Burr. 467.

c Kent's Com.  
412, & Clow  
v. Woods, 5  
Serg. and  
Rawle, 275.  
d 1 Gall. 423.

is suspicious, by reason of the inconsistency; that the probable effect is, "to delay, hinder or defraud creditors," and the parties must be presumed to have intended what naturally flows as a consequence of their acts; and also, that less rigor affords facility to contracts on fictitious considerations, creating colorable liens on property. And though it is true many sales, in form conditional, have been, and may be created, that are fully obnoxious to the same legal objection; yet that a material distinction exists, is sufficiently apparent, as well from necessity as a series of decisions under the common law and statutes of *Elizabeth*; previous to the bankrupt act of 21st James I., this act subjected to the commission of bankruptcy all chattels which the bankrupt used and possessed as owner, though they had never been his. And the same distinction has been since observed, except in cases falling within the legitimate or spurious influence of the bankrupt law. The case of *Ryall v. Rowles*,<sup>a</sup> which was on a mortgage, and held subject to the rule of possession, as also *Worsely v. Demattos & Slader*,<sup>b</sup> were under the bankrupt act, and governed by it. I am free to concede, that some of the modern, as well as earlier decisions, have blended the true doctrine, under the various statutes declaratory of the common law, with the principles of the bankrupt law, and have failed to preserve the necessary distinction between absolute and conditional sales. It cannot, however, be tolerated, that a mere agreement, though expressed in the deed, if incompatible with its object, can obviate the objection of fraud. The validity of the sale must depend on the circumstances, "and it must appear to be for a purpose fair, honest and necessary or conducive to some fair object in view. Appearances must not only agree with the real state of things, but the true state of things must be honest and consistent with public policy."<sup>c</sup>

It is remarked by Judge Story,<sup>d</sup> that "these principles of the common law are undoubtedly founded upon the consideration, that possession of personal chattels constitutes the ordinary *indicium* of ownership, and that the greatest public mischiefs would arise, if secret and unavowed transfers might overreach the attachments of creditors. It would enable debtors to hold out false colours, and protect conniving contracts from the animadversions of the law. The mischief would be still greater, as to sheriffs and other public officers. They must act at their peril, and where the debtor is in the open and visible possession of

JANUARY 1830.

Ayres  
v.  
Moore

property, exercising acts of ownership, they are compelled to seize it on the proper judicial process; and great indeed would be the hardship if their proceedings could be overhauled in an action of tort, where the utmost diligence and care could not protect them from deception. Upon principle, independent of authority, it would seem that substantial justice would require that a party who has a secret transfer of property left in possession of the original owner, should be held to waive his right in favor of creditors and public officers, even if the case were not held infected with fraud. *Vigilantibus non dormientibus leges subserviunt.*" Another consideration in support of this principle, is, that in all cases where it can apply, the equity is at least equal against the validity of the sale, even if the sale be *bona fide*. The contest is between claimants alike meritorious, and the struggle is, which shall lose, whether the vendee, who has permitted a failing or insolvent debtor to continue the possessor and apparent owner of the property, or a creditor in the ordinary pursuit of his debt, and which has probably been contracted, or the collection delayed on the credit of the debtor's visible property; certainly the loss should fall on him who has contributed to the means of procuring a false credit.

It is much less important to justice, whether the judge or jury determines the question, than that the law should be correctly administered. Yet, if the law and policy of the country dictates the necessity of constructive fraud in relation to any transactions, I think no other can more imperiously demand it, than the case of an insolvent, who has absolutely conveyed his property at private sale, under an agreement that he shall retain it, and who has, by the permission of the vendee, continued the visible and reputed owner, and thereby acquired the means of continuing his credit; and also procured time to squander, or in some way place the proceeds beyond the reach of his creditors, if, according to the secret fact, any consideration was given. Under such circumstances, it is an outrage on common sense, to deny but that the debtor has the means of practising deception and fraud on the community, which otherwise he could not have. It is a fact, in its nature, often unsusceptible of proof, whether any or how many of the creditors have casually received information of the sale; and if the sale be void as to one creditor, whose debt is equal to the value of the property, the ef-

JANUARY 1830.

Ayres  
v.  
Moore.

fect on the contract is the same as if void as to all; moreover, the law has established the priority and equality of debts; therefore, a sale which is void at law as to one creditor, is void as respects them all. But perhaps it is sufficient for the judiciary to expound the existing law, until it is authorised to modify it; and as it has uniformly been conceded by all who have most adorned the annals of jurisprudence, that whether a transaction be fair or fraudulent, is often a question of law; that it is the judgment of law of facts, and intents, I am constrained to consider the principle so established, except so far as I am controlled by contrary decisions of this Court, and while they prevail. Then certainly, where material facts, or material intents are disputed, and so far as they are contested, they are to be submitted to the jury under the instruction of the Court as to the law; it being then a mixed question of law and fact. But shall the Courts shrink from their province, and do less? Shall the Judge only say to the jury, that though the want of possession is *prima facie* evidence of fraud, it is subject to explanation to the satisfaction of the jury, and under whatever circumstances submit the farther decision to their discretion? In contests between suspicious or masked vendees and creditors, where the vendor being in failing circumstances, has remained the visible and reputed owner of the property, and enjoyed all the means of deluding the public by procuring false credit; or where there is no evidence of a legal consideration; or where only matter tending to excite sympathy, or something rather in the nature of collusion than legal merit, is relied on to remove the objection to the validity of the sale, what is the legal course? Shall the judge simply submit the question to the jury, whether the parties to the contested sale have acted in good faith or meditated fraud; and instruct them to govern their decision accordingly? Or shall he instruct them, that according to a supposed state of facts, if they find them to exist, the sale is, or is not fraudulent? The decisions of the Court, as expressed in this case, and in the case of *Hobbs v. Bibb*,<sup>a</sup> do not explicitly determine, but leave an inference favorable to the general submission to the jury. If such be the course adopted, this state must become subject to an infinite variety of laws of property, and the due responsibility of the bench is transferred to the jury box; for then the legal principle of decision is smothered, and placed beyond the reach of revision by the Supreme Court; and as Chancel-

<sup>a</sup> Ante, p. 54.

for Kent remarks, "fraud in fact is reluctantly drawn by a jury, and their sympathies must be overcome by strong and positive proof before they will readily assent to the existence of a fraudulent intent, which is so difficult to ascertain, and frequently so painful to infer." By the different course suggested, the jury is excused from responsibility incompatible with their organization, and we might expect, at least, uniformity of principle from either the Circuit or Supreme Court.

The doctrine of constructive fraud, was directly involved in a case before the Supreme Court of New York, as late as 1827. <sup>a</sup> The same Court, on whose authority in the previous decision, <sup>b</sup> the idea of constructive fraud is mainly resisted. The bill of sale was for one half of a sloop, absolute on its face, and for a valuable consideration; but the vendor agreed by a written memorandum, executed at the same time, to allow the vendor, who was embarrassed, twelve months to redeem the property. The transfer was immediately entered at the custom house, and new papers taken out in the names of the vendee and the other joint owner. Less than one fourth of the amount was paid by the vendor in a short time, towards the redemption of the sloop. Afterwards, and within about one month after the sale, other creditors obtained a large judgment against the vendor, who had remained in the possession and control of the vessel, as agent of the owners. These are, substantially, the facts on which the Circuit Judge decided, "that the bill of sale was fraudulent as to creditors in judgment of law, and refused to suffer the case to go to the jury." The Supreme Court affirmed the decision for the same reason.

It is only deemed necessary farther to notice, that the case of *Steward v Lombe*, <sup>c</sup> decided in 1820, by the Court of C. B. which more than any other English decision, is supposed to have shaken the authority of the case of *Edwards v. Harbin*, did not necessarily involve the question of constructive fraud, or whether actual possession was necessary to transfer the property in chattels. It is true, some of the Judges intimated doubt respecting the extent of the authority, but they all agreed, that the two cases were clearly distinguishable, and that their decision did not conflict with the other. The case of *Steward v. Lombe*, was on a mortgage, and the article in contest was a windmill. The question was, whether it should have been severed from the land, and the possession transferred.

JANUARY 1839.

Ayres  
v  
Moore.

<sup>a</sup> *Statson v. Brown, Cow,*  
732.  
<sup>b</sup> *7 Bissell v. Hopkins.*

<sup>c</sup> 1 Brod. & Bing. 506.

JANUARY 1830.

Ayres  
v.  
Moore.

The Court decided, that "whether the mill was legally a fixture or not, it was at all events actually fastened to the land, and it was not to be expected the mortgagee should come to reside in a mill, or that he should turn miller in order to take possession of his security;" and that it was "very different from the case of goods, capable of being transferred from hand to hand; the possession of these by a supposed vendor, after sale, may be a badge of fraud."

Upon a full view of the subject, I conclude that the doctrine of constructive fraud, and of the necessity that the possession of chattels shall be consistent with the deed, at least as far as I have here advocated it, is fully sustained by all the higher Courts of England, by a very large majority of all the States of the Union, and by the uniform decisions of our entire Federal Judiciary. I am therefore of opinion, if the principles of the decision in *Hobbs v. Bibb*, be sustained, that they should at all times be restricted to the narrowest ground that will allow a discretion to the jury in determining that the constructive badge of fraud has been sufficiently explained; and that the judgment in this case must be reversed, and the cause remanded.

Reversed and Remanded.

JUDGE CRENSHAW, not sitting.

### HARRISON V. DAVIS.

1. In trespass, a plea of justification under process, must specify the process particularly, and state every fact necessary to shew the justification.
2. The process must be correctly described; if there is a variance it cannot be given in evidence.
3. In trespass for taking goods from the plaintiff's possession, under the general issue, the defendant cannot go into evidence to shew that the sale under which the plaintiff holds, is fraudulent.

JAMES DAVIS, declared against D. Harrison, in Bibb Circuit Court, in an action of trespass, charging him with having taken and led away a certain horse, the property of him; said Davis. The defendant pleaded, 1st, the general issue. 2dly, a special plea in justification; in which he stated "that he was a constable, &c.; that as such, he re-

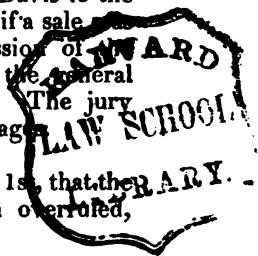
JANUARY 1838.

Harrison  
v.  
Davis.

ceived from L. A. Leonard, a justice of the peace for Bibb county, an execution in favor of one Green B. Woolly, against W. Davis, for \$ 17 75, besides twelve and one half cents interest and costs, to do execution thereof; that by virtue of said precept, he levied on the horse as the property of said W. Davis; and that the horse was his property, &c." 3dly. A general plea in justification, alleging "that he seized and sold the horse as the property of W. Davis, by virtue of sundry executions against said W. Davis, placed in his hands as constable," &c.; and 4thly, "That as constable, &c. he received from E. Gaskill and L. A. Leonard, justices of the peace, &c. other executions, one in favor of Thomas Rayfield, against W. Davis, for \$ 15, and the other in favor of J. Horne, for \$ 25, with costs, which executions were placed in his hands to collect, and by virtue of which he seized and sold the horse as the property of W. Davis, whose property he was," &c. The plaintiff joined issue on the 1st, 2d and 4th pleas; and demurred to the third plea, which demurrer was sustained.

At November term, 1827, the issues were tried, when the defendant, Harrison, offered in evidence under his pleas, several executions, to wit, one in favor of Woolly, for \$ 17 87½ debt, 12½ cents interest, and \$ 7 75 costs; one in favor of Rayfield for \$ 15 debt, 40 cents interest, and cost of suit; and another in favor of Horne for \$ 25, debt, 18½ cents interest, and \$ 2 costs, which were objected to by the plaintiff and by the Court rejected. The defendant also offered to prove that the horse was formerly the property of William Davis, the defendant in the executions; that the plaintiff never had possession of him, and that at the time of the supposed trespass, he was in the possession of one Risinger; that at the time the debts were contracted, which were the foundation of the executions, William Davis was the reputed owner, and had the possession of him. The Court admitted this evidence, but instructed the jury, that should they believe the property was fraudulently conveyed by William Davis to the plaintiff, with intent to defraud creditors, yet, if a sale was made, and the property came to the possession of the plaintiff or his agent, it was no defence under the general issue. To which the defendant excepted. The jury found a verdict for the plaintiff for \$ 105 damages.

HARRISON, assigned for error, in this Court, 1st, that the demurrer to the third plea should have been overruled,





JANUARY 1830. and 2d, that the executions were improperly rejected, and that the instructions given to the jury were erroneous.

Harrison

v.  
Davis.

GOLDTHWAITE, for the plaintiff in error. The first assignment of error is not relied on. The second consists of two points. 1. The rejection of the executions. The one in favor of Woolly is described in the defendant's plea; the mere mistatement of \$17 75 and 12½ cents interest, instead of \$17 87½, cannot vitiate the defence. 2. The instruction of the Court. We contend that under the general issue, the defendant can properly offer evidence of property in another in mitigation of damages, especially when it is shewn that the plaintiff was endeavoring to perpetrate a fraud; and that in trespass, a constable can shew that the plaintiff's possession was fraudulent. <sup>a</sup>

<sup>a</sup> 5 Term R. 112. 3 Starkie's Evid. 1457-1461.

<sup>b</sup> 20 John. R. 144.

<sup>c</sup> 4 John. R. 450. 12 John. R. 320. Laws of Ala. 510, Sect. 1 & 2.

<sup>d</sup> Chit. Plead. 493 to 6. 13 John. R. 443.

<sup>e</sup> 11 John. 285-379.

<sup>f</sup> 8 John. 337-434. 9 John. 336-242. 11 John. 285-379. 13 John. 150-284.

<sup>g</sup> 13 John. 284.

<sup>h</sup> 11 John. 383.

CLARK, for the defendant. The demurrer was properly sustained. <sup>b</sup> The executions offered were variant from those pleaded, and were properly rejected. <sup>c</sup> A sale by an officer when relied on as a justification, must be specially pleaded. <sup>d</sup> Property draws to it possession, and possession of the agent is the possession of the principal, <sup>e</sup> and possession is sufficient to maintain trespass. <sup>f</sup> It is not competent for a trespasser to shew property in a stranger, <sup>g</sup> there is a distinction in this respect between trover and trespass. <sup>h</sup>

By JUDGE SAFFOLD. The first assignment is, that the Court erred in sustaining the demurrer to the third plea. As this assignment was not particularly relied on by the counsel, it is sufficient to say, the plea did not present a legal defence, but was clearly insufficient for the reasons that it contained no description of the executions, or any averment that the horse was the property of the defendant therein.

Second. It is also assigned for error, that the Circuit Court rejected admissible evidence, and gave and refused instructions to the jury, as described in the bill of exceptions.

The first branch of the objection respecting the testimony is, that the executions were offered in evidence, under the special pleas, to shew the defendant's authority for taking and selling the horse, which the Court rejected. On comparison, it is found, that a variance exists in the amount of all the executions offered in evidence,

JANUARY 1839.

---

Harrison  
v.  
Davis.  

---

and those described in the pleas. The least difference between any of them is, the amount of eighteen and three fourths cents interest, required by the execution, but unnoticed by the plea. The plea also omitted to shew the amount of costs in the same execution, describing it only as one "in favor of Jesse Horn, for the sum of twenty-five dollars, with costs, against said William Davis," when the execution had ascertained the amount of costs to be two dollars. Then the inquiry is, was this a fatal variance in the description? As the amount of costs must necessarily have continued to increase with the progress of the execution, and no sum differing from the true one was expressed in the plea, the failure to specify the amount was not a material variance. But as respects the interest, there is more difficulty; a variance of eighteen and three fourths cents in the amount of principal or interest, involves the same principle that the same or any other number of dollars would do. The variance is so slight, that it is with reluctance we sustain the objection, yet, could we disregard this amount, we would have no criterion by which to be governed; and must therefore sustain exceptions for the smallest variance in sums where they are specifically expressed, as a main feature of the description. It is true, a previous execution appears to have issued between the same parties, probably on the same demand, describing the amount to be twenty-five dollars, and two dollars costs, and which had the figure 2, and the words "Interest 18 $\frac{3}{4}$ " indorsed upon it, from which it may be inferred, the last was intended as an alias; they were both, however, in the form of originals, and contained no express reference to each other. But it also appears from the defendant's return that the previous execution had been levied on other property which had been sold, and the proceeds applied to older executions; that the force of the former had been spent, and it had been returned some time before the seizure of this horse; it could therefore afford no justification for the subsequent taking; and was certainly inadmissible under a plea describing an execution in the defendant's hands at the time, and which had been levied on the horse. The variances with reference to the other executions are still greater. Hence, it is conceived, there was no error in excluding the executions, and the transactions connected with them from the consideration of the jury.

Under this assignment, it is further objected that the

JANUARY 1830.

Harrison  
v.  
Davis.

---

instructions given by the Court were erroneous. If the executions which were offered in evidence as a justification were correctly excluded, the defendant Harrison was placed in the attitude of any other indifferent person, and had no right to intermeddle with the property, whether it belonged to James or William Davis; nor was it material to him whether the sale by which the horse had been transferred to the former and placed in his or his agent's possession, was *bona fide* or fraudulent. The law is believed to be entirely clear, that one who commits a trespass on property in the possession of another who claims to be the absolute or qualified owner, can neither justify or palliate the trespass by proving that the ostensible owner claims and holds the property under a fraudulent sale from a third person, between whom and the defendant there is no privity of interest or connection of title. Such sale, though it may have been fraudulent and void as to creditors and purchasers, would have been valid as between the parties, and in relation to all indifferent persons. It was not until the evidence under the special pleas had been rejected, that the Court instructed the jury, that the alleged fraud could not constitute a defence under the general issue. A legal defence to an action implies some available matter entitling the defendant to a partial or total discharge from the supposed liability, and as this alleged fraud could not legally have had either effect, there was no error in the instructions.

To mitigate hardship and avoid injustice from mistakes, slight variances and inadvertencies, the Courts usually grant new trials on equitable terms at the instance of the aggrieved party, and permit amendments in the pleadings. Such was the relief the law contemplated in a case like the present, and it can scarcely be doubted, but the Court would have granted a new trial on terms, had it been applied for on a shewing that material injustice would result from the misdescription of the executions. A majority think the judgment below must be affirmed.

By JUDGE CRENSHAW. In this case an execution in favor of Horne, as described in the plea, is for the sum of twenty-five dollars, with costs. The execution offered in evidence, was for twenty-five dollars debt, two dollars costs, and eighteen and three quarters cents interest. On the back of this execution, from the indorsement made by the justice, it is obvious that this was a renewal of a pre-

JANUARY 1830.

Harrison  
v.  
Davis.

---

vious execution for the same amount, with the exception of the interest, and which execution was also offered in evidence. And to my mind, it is equally apparent, that the eighteen and three quarters cents, was the interest which accrued between the time of issuing the two executions; and this is the reason why it does not appear in the first execution. I hold then, that there is no variance. But suppose there was a variance of eighteen and three quarters cents between the execution described in the plea, and that offered in evidence, was the variance so material as to warrant the Court in rejecting the evidence? I apprehend not. Because the plea does not profess to set out the execution in *hæc verba*. And it was sufficient if the execution described in the plea, contained such marks of identity as plainly shewed it to be the same with that offered in evidence. In 5 Johnson, <sup>a</sup> in an action for an escape, the plaintiff stated the substance of the execution in his declaration, without setting it out in *hæc verba*, but in the execution produced in evidence, there was a variance of one cent in the amount of damages and costs; it was held to be immaterial.

<sup>a</sup> Page 89.

I am therefore inclined to the opinion; that if there was a variance in the case before us, it was so small a one as to be immaterial.

These executions, therefore, should have been admitted, and as a necessary consequence of their admission, the evidence going to prove that the right of property in the horse levied on, was in the defendant in the execution, or in other words, that the sale of the horse to the plaintiff below, in the present action, was fraudulent and void.

For these reasons I think the judgment should be reversed and the cause remanded.

JUDGE LIPSCOMB, concurred with JUDGE CRENSHAW.

Judgment affirmed.

JUDGE TAYLOR, not sitting.

JANUARY 1830.



## FOSTER V. FOSTER.

J. H. F., J. K. and J. F. entered into articles of agreement concerning lands to be held between them; J. F. being alone in possession. Afterwards a patent issued to them as tenants in common. J. F. died, leaving his widow and devisee, M. F. in possession. J. H. F. brought trespass to try titles against M. F. for one third of the premises. It was held.

- 1st. That one tenant in common, cannot maintain the action against a co-tenant without proving actual ouster.
2. But that M. F. was not tenant in common with J. H. F. and J. K.
3. That the articles and will were not evidence in her defence to shew a tenancy in common.
4. That the action was maintainable, though no dower had been assigned to her.
5. In trespass to try titles against two, though the plea be joint, the jury may find against one, and not guilty as to the other.

JAMES H. FOSTER, brought an action of trespass to try titles, in Greene Circuit Court, against R. Harrison and Mary Foster, and declared against them for one undivided third part of a tract of 320 acres of land. The defendants pleaded not guilty.

At February term 1828, the cause was tried. The plaintiff, J. H. Foster, proved that in 1820, one Josiah Foster settled upon the tract of land in question, by clearing a farm of about sixty acres thereon, the land then belonging to the government; that in 1821, he died, leaving Mary Foster, his widow, in possession; that he left no children; that she had remained in possession ever since. He gave in evidence, a patent for the land from the government of the United States, dated the 25th of November 1825, issued to himself, and to Josiah Foster, and Jehu Kirksey, and their heirs and assigns as tenants in common. The plaintiff further proved that he never had possession of any part of the land, and proved the value of the rent. The defendants offered to introduce as evidence on their part, certain articles of agreement made in May 1819, between the said James H. Foster, Josiah Foster and Jehu Kirksey, binding the two latter to pay to the former certain portions of the purchase money of lands therein specified, including the land in controversy, and the said James H. to convey to them, &c. when he should obtain title, &c. They further offered to prove by the record, the commencement of a suit in Greene county Court, by the plaintiff, against them as the personal representatives of Josiah Foster, deceased, founded on said ar-

JANUARY 1880.

---

Foster  
v.  
Foster.

---

ticles of agreement; and also the record of a bill in Chancery, filed by themselves against said James H. for a discovery and to injoin said suit, together with the answers thereto. They also offered a copy of the will of the said Josiah Foster, dated in 1816, by which, after providing for the payment of his debts, the testator left the residue of his property with a few exceptions to his wife, Mary, during her life or widowhood, with power to sell at valuation for her convenience, with the approbation of his executors, and to dispose of the land, and remove the personal property to any part of the United States she might wish; but at her death or marriage, one half of said property, or its proceeds, was bequeathed to others. To all this evidence of the defendants, the plaintiff objected. The objection was sustained, and it was rejected. The counsel for the defendants requested the Court to instruct the jury, that if they believed the defendants, or either of them were tenants in common with the plaintiff in the land, that it was necessary to entitle the plaintiff to recover, to prove he had been in actual possession before the commencement of the action, and that the defendants had actually ousted him. But the Court refused the instruction, on the ground that it was not authorized by the evidence; and instructed them that if Josiah Foster, deceased, was a tenant in common with the others, that his widow, Mary Foster, was not. The defendants also requested the Court to charge the jury, that if dower had never been assigned to the widow, Mary Foster, that she was entitled to the possession of the real estate of the deceased, till it was assigned her, and that her holding the land as widow, was not adverse to, but in privity with the rights and possession of her deceased husband. They further requested the Court to charge the jury that if they believed R. Harrison not guilty, they should find in favor of both defendants. These instructions were also refused. To all which the defendants excepted. The jury found a verdict for the plaintiff against Mary Foster only, for one third of the land, and for one cent damages, and not guilty as to Harrison.

Mary Foster, in this Court, assigns the foregoing matter as error.

SHORTRIDGE, for the plaintiff in error. Josiah Foster was tenant in common with the plaintiff below, as is evidenced by the patent itself. The same right continues

JANUARY 1830.

Foster  
v.  
Foster.

to his representatives in estate. <sup>a</sup> Mary Foster then being tenant in common, an actual ouster was necessary, before this action could lie against her. <sup>b</sup>

<sup>a</sup> 9 John. R. 270. 4 Bibb, 422. Blk. Com. Title, Joint Tenancy, 192.

<sup>b</sup> 2 Phillips' Evid. 172. 7 Cranch, 456. Adams on Eject. 55-58. 15 John. R. 501. 1 Salk. 192. Archbold's Cir. Pl. 514.

<sup>c</sup> Blkst. Com. Tit. Dower. Laws of Ala. Tit. Dower.

<sup>d</sup> Thomas' Coke, 694. 1 Chitty's Blkst. 98. 2 Ibid, 152.

<sup>e</sup> 1 P. Wms. 575. 11 Mod. 148. 2 Ves. jr. 417. 7 T. R. 419. 10 John. 32.

CHAPMAN, for the defendant in error. The proposition may be admitted, that to sustain an action against a co-tenant, a tenant in common must prove an actual ouster, or something tantamount; but Mary Foster is not a tenant in common with the plaintiff. She holds as a trespasser. She can claim nothing by any right of dower. It is only estates of inheritance which are subject to dower, and here Josiah Foster died several years before the patent issued, and therefore when he had no title. <sup>c</sup> But if she had any right to dower, it is waived by her acceptance of the provisions of the will; she may elect, but cannot under the statute have both. Even had she been entitled to dower, what would have been legal evidence of such right? Clearly it would have been her petition for dower, and the assignment of it by the Court; for till assignment, she has no title, and the very neglect to claim it, and still continuing to enjoy the premises, is an evidence of waiver of it, and election to hold under the devise. An entry by the widow, without assignment of dower is a trespass. <sup>d</sup> As devisee, her title against us, is equally unavailing. The will was made previously to the acquisition of the lands by Josiah Foster, and after acquired lands do not pass under the will. <sup>e</sup> Nor can her being executrix entitle her as tenant in common, for freeholds vest in the heir at law immediately on the decease of the ancestor, and the executor, as such, has nothing to do with them.

By JUDGE WHITE. In the rejection of the evidence offered by the defendants below, and in the other matters hereinafter noticed, it is insisted the Circuit Court erred. The avowed and only legitimate object of this evidence was to shew, that Mary Foster, one of the defendants, was tenant in common with the plaintiff in the lands in controversy. If this were the case, it was important to the defence; as one tenant in common cannot sue another till actual ouster, or its equivalent. Would then the evidence, if allowed to go to the jury have proven Mary Foster a tenant in common with the plaintiff? The articles of agreement, as already shewn, were dated long prior to the emanation of the grant, and contemplated

JANUARY 1830.

Foster  
v.  
Foster.

---

the acquisition of the title in future. They therefore vested no estate in either Josiah Foster or Mary Foster, his widow, and were, no doubt, properly excluded. The same may be said of the suit at law and in Chancery, founded on, and growing out of them. The will was made nine years before Josiah Foster acquired the lands in question, and if its provisions were admitted to be strong enough to vest a title in his widow, to the lands he possessed at the time it was executed, yet as it contained no prospective devise which would reach real property afterwards obtained, she acquired no interest in such property. The copy of the will, therefore, if read to the jury, would have proven nothing material to the issue. But it is contended, that the widow had her right of dower in the land; an interest not inconsistent, but in privity with that of the plaintiff. The widow was provided for, as already seen, by the will of her husband, which was recorded in 1821, five or six years before the commencement of this suit; and without determining whether she should not have renounced the provision under the will in the manner and within the time prescribed by the statute, to have authorized a claim to dower in these lands, it may be sufficient to say, she ought not, after such a lapse of years, to be permitted to interpose that claim against the right of one seeking the possession of the inheritance, but should be left to seek her dower in the ordinary way. After what has been said, it is scarcely necessary to add, that the Circuit Judge very properly refused to charge as requested, that if the jury believed the plaintiff was tenant in common with the defendant, the action could not be maintained without an actual ouster; such a charge would have been totally irrelevant, as there were no facts to which it would apply. The last request made of the Court was, to charge the jury that if they believed Harrison, one of the defendants, was not guilty of the trespass, they should acquit him, and the other defendant also. This too, was well refused, for there is no principle better settled, than that one defendant may be found guilty of a trespass, and the other acquitted. The Court are unanimously of opinion, that the judgment must be affirmed.

JUDGE CRENSHAW, not sitting.



JANUARY 1830.



## THE STATE V. CAWOOD et al.

1. A confederacy to do an unlawful act, to the injury of another, is sufficient to sustain an indictment for a conspiracy; it is not necessary that such act be actually committed.
2. A conspiracy is punishable by fine and imprisonment, as a misdemeanour.
3. In criminal cases, where not affected by statute, the common law of England is in force in this State, so far as consistent with the spirit of our institutions.
4. And though the common law punishment in some cases may be inapplicable, the offence may nevertheless be punished as a misdemeanour.

THOMAS CAWOOD, FRANKLIN BROWN, and TAYLOR BROWN, were indicted in the Circuit Court of Jefferson county, for a conspiracy, and at October term, 1829, were found guilty and fined by the verdict of a jury. A motion being made to arrest the judgment, the presiding Judge referred the question of the legality of the conviction to this Court, under the provisions of the law for determining questions novel and difficult.

The indictment charged, that the defendants "wickedly and maliciously devising and intending unjustly to vex, oppress John Self, and to deprive him of his good name, fame, credit and reputation, &c. on &c. at &c. wickedly and unlawfully among themselves, did combine, conspire, confederate and agree, falsely and without any reasonable or probable cause whatsoever, to charge and accuse the said John Self with having stolen, taken and carried away, feloniously, a certain bank note, for the payment of one dollar, of the value of one dollar, on the Augusta Insurance Company," &c. And that "the said Franklin Brown, on, &c. at &c. in pursuance of, and according to said conspiracy, combination, confederacy and agreement, between them, &c. did say to the said John Self, that he the said John Self was a man of credit, and that he, the said John Self, had better make it up than have his credit blasted." And that the said Franklin, in pursuance of said combination, conspiracy, &c. so had; &c. did, on &c. at &c. unlawfully and wickedly exact, take and receive, of and from the said John Self, a sorrel mare, of the goods and chattels of the said John Self, of the value of fifty dollars, for and as a compensation for the pretended offence above mentioned; whereas in truth and in fact, the said John Self never was guilty of any such offence, &c. To

the great damage, &c. and against the peace and dignity, &c. JANUARY 1830.

The State  
v.  
Cawood et al.

SHORTBRIDGE and PECK for the defendants, contended that the judgment should be arrested:

1. Because a conspiracy is not an offence reached or punishable by the laws of this State. <sup>a</sup>

2. Because the indictment itself is insufficient. It alleges only, that they conspired to charge and accuse, without averring that the charge was to be by indictment before a competent Court, or in what manner, or that any act was done. It should also be expressly averred that the defendants did "falsely charge." It has not the legal precision which is necessary. <sup>b</sup>

STEWART, for the State, insisted that a conspiracy is an offence at common law, and that as such, not being provided for particularly by our statute of crimes and punishments, it was punishable as at the common law, as provided by the general clause of the statute, which is to that effect; that as to the form of the indictment, no more certainty is required in an indictment than in a declaration, and that it is according to the authorities and precedents.

<sup>a</sup> Declaration of Rights, Const. sec. 12. Laws of Ala. 915. Schedule of Con. sec. 5. Laws of Ala. 932-3. Ibid. 214, sec. 45. 1 Hawk. P. C. 449. Wheeler's Crim. Law, 149, note. <sup>b</sup> 2 Burr. 993. 999. 2 Blk. Com. note 19, p. 92. 2 Mass. 536-37. 3 Burr. 1321. Crown Cir. Com. 243-4.

By JUDGE COLLIER. The points insisted on, present for our consideration, two questions. 1. Is a conspiracy an indictable offence by the laws of this State? 2. Is the indictment sufficient in law?

It was conceded in argument, that a conspiracy was punishable at common law, but that we had not adopted it as an offence in our code of criminal jurisprudence. This objection we think is not sustainable; yet for its novelty, it merits consideration. By the 2d article of the ordinance of 1787, "for the government of the Territory of the United States, North West of the Ohio," which was afterwards made the fundamental law of the Mississippi Territory, it is provided that "the inhabitants of the said Territory shall always be entitled to the writ of *habeas corpus*, and to the trial by jury; to a proportionate representation of the people in the legislature, and to judicial proceedings according to the course of the common law." This provision was doubtless made with reference to the common law of England, and hence that law need not have been declared to be in force here by express enactment; but if express legislation were necessary, the part of the ordinance referred to, may be considered as having that

JANUARY 1830.

The State

v.

Cawood et al.

a Laws of Ala.  
214.

effect. We cannot yield our acquiescence to the proposition, that the common law of England was abrogated by our secession from that country, although aware that this doctrine is sustained by some respectable names. We are willing to admit, that as the common law of England, it no longer obtains, yet as the law of the different members of the union, in which it once obtained, it still maintains validity without the aid of legislative enactment, so far as compatible with the genius of our institutions.

I take it then as most obvious, that Congress designed to make the common law of England, so far as applicable, the rule of action, both in civil and criminal proceedings in the Mississippi Territory. This idea, in regard to crime, is strengthened by the 45th section of the "act for the punishment of crimes and misdemeanours, originally passed in June, 1802, but re-enacted with amendments in 1807." \* After the enumeration of many offences, among which conspiracy is not included, the section referred to, declares "that every other felony, misdemeanour or offence whatsoever, not provided for by this, or some other act of the General Assembly, shall be punished as heretofore by the common law." This act was enacted upon the hypothesis, that the common law was in force here; or it would have specifically mentioned the offences which were understood to be punishable.

This being all the written law upon the subject, existing anterior to the adoption of our constitution, the 5th section of the schedule of that instrument, declares that "all laws and parts of laws, now in force in the Alabama Territory, which are not repugnant to the provisions of this constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the legislature thereof." By this section it is clear, that all laws whether unwritten or statute, if consistent with the constitution, are continued in force.

It is proper to consider now, what conspiracies are punishable by the common law. It was insisted in argument, that to make the defendants criminally amenable to the laws, it was necessary that their unlawful intention should have developed itself by some advances towards its consummation. We think differently, and believe that the brief definition of the offence, given by Lord Coke, and relied on by the counsel for the plaintiffs in error, as conducing to that conclusion, if to be understood literally, is

too contracted. Numerous cases of conspiracy have been adjudicated in the Criminal Court of New York, which are reported in the New York City Hall Recorder; some expressly upon common law principles, and none, so far as we have been able to discover, on a statute; all of which inculcate a doctrine very different from that of Lord Coke. It is there held, <sup>a</sup> that to sustain an indictment for a conspiracy, it is incumbent on the public prosecutor to shew that two or more persons confederated together to do an act known by them at the time to be unlawful, and without colour of right; or to prove some facts from which such a confederacy can be reasonably inferred. It is also there held to be unnecessary in a prosecution for a conspiracy, to shew that any step was taken by the conspirators or either of them, to consummate the act agreed to be done, it is sufficient if an agreement to do some unlawful act existed. <sup>b</sup> It is further held, that an indictment for a conspiracy to cheat or defraud an individual of his money or goods, may be maintained though the means be not charged by which the conspiracy was to be effected. <sup>c</sup> In a cause which was there argued elaborately by very eminent counsel, upon the common law doctrine, <sup>d</sup> it is held that any confederacy to do that which will injure an individual, is a conspiracy, though it might be just and lawful for either of the parties to such confederacy individually to meditate and accomplish such act. <sup>e</sup> I will remark, that the cases quoted from the City Hall Recorder, were argued by the most distinguished lawyers of New York, and determined by some of the ablest jurists of that State; and as authority, are therefore very respectable.

It cannot be, as insisted by the counsel for the plaintiffs in error, that a conspiracy is not an offence known to our laws; because the villanous judgment which was awarded to it by the common law, would not be tolerated by our constitution, as being, if not cruel, at least unusual. Without inquiring whether a conspiracy which did not suppose an accusation of some crime punished capitally, or some crime of the species of *crimen falsi*, has been thus rigorously punished, we are prepared to say, that if the constitution repealed the appropriate common law punishment, the offence still continues, and may be punished as all other misdemeanours to which no other punishment was assigned, by fine and imprisonment. This doctrine in the case of a common scold, underwent a very able discus-

JANUARY 1839.

The State  
v.  
Cawood et al.

<sup>a</sup> New York  
City Hall Re-  
corder, 4th  
vol. pages 1  
and 12.

<sup>b</sup> Ibid p. 121.

<sup>c</sup> Ibid, vol. 5,  
p. 112.

<sup>d</sup> Ibid, vol. 6,  
p. 33.

<sup>e</sup> See also Ja-  
cob's Law  
Dict. Title,  
Conspiracy.  
Crown Civil  
Com. 290.  
Hawk. P. C.  
b. 2. c. 25,  
sec. 116, page  
71. 4 Blkst.  
Com. 158-9  
Ib. Christ.  
note 4.

JANUARY 1830.

The State  
v.  
Cawood et al.

sion in the Supreme Court of Pennsylvania a few years ago, in which Judge Duncan delivered a very learned opinion, deciding, that though the ducking stool could no longer be used, fine and imprisonment might be substituted. And we believe, in the celebrated case of the *United States v. Ann Royall*, under the influence of the common law, the defendant was punished by fine and imprisonment. Having shewn, as we believe, that a conspiracy is an offence punishable by our laws, we proceed to consider the sufficiency of the indictment.

a Page, 1175.

b Page, 1320.

The indictment, with only slight and immaterial variations, conforms to the precedent in 3 *Chitty's Criminal Law*,<sup>a</sup> which, on objection, was holden to be good in 3 *Burrows*.<sup>b</sup> If the cases to which we have referred, as shewing the essentials to constitute a conspiracy, are founded in correct ideas of the offence at common law, and of this, we do not doubt, we are at a loss to conceive to what part of the indictment exception can be taken; and have therefore no hesitancy in declaring that the judgment must be affirmed.

Judgment affirmed.

---

SYKES et al. v. SYKES et al.

1. To constitute a nuncupative will, the words spoken must have legal certainty, and be intended as a will.
2. And they must be spoken in *extremis*.

THIS was a bill in Chancery, filed in Morgan Circuit Court, in December 1827, by Richard Sykes, for himself, and as guardian for, and next friend of Robert Sykes, William Sykes, and Rebecca Sykes, infants, against James T. Sykes, administrator with the will annexed, and James Sykes, an infant, for the purpose of setting aside a nuncupative will, which had been admitted to probate as the will of John Sykes the deceased brother of the complainants.

The bill charged that John Sykes, died intestate, about the 3d of February 1827, leaving real and personal property, greatly exceeding one hundred dollars in value; and that the complainants and James Sykes were his lawful

heirs and distributees; that a nuncupative will was proved and recorded on the oath of Joseph Sykes, in Morgan county Court; the record of which is in these words: "Being at John Sykes' on the 2d day of February 1827, he being weak in body, but I believe sound in mind and memory, I asked him what he thought of his situation, if he thought he ever should get well, he once thought so. I asked him in case he should die, the way we must all go, what he wanted done with his property; he observed he wanted his brother James to have it all. He died on the 3d day at night, somewhere about two o'clock. This 4th of February 1827. JOSEPH SYKES."

JANUARY 1830.

Sykes et al.

Sykes et al.

It is further alleged, that the words were spoken in the presence of only one person, the said Joseph Sykes; that the declarations were loosely made, a day or two before his death, when he was doubtful if he would recover or die; that the witness was not called on to hear the words as the last will of the deceased, but that the words were spoken in answer to casual questions, made to him by said witness; that at the time, he was completely able to have made a will in writing, with all due solemnities; that the said supposed will had been admitted to record without due solemnity; that the complainants reside in Virginia, and had no notice of the probate. The complainants charged that the defendant, James T. Sykes, had procured letters of administration, with the will annexed, and would proceed to deliver the estate to James Sykes; and they prayed that the probate and will might be set aside, and that distribution be made as in cases of intestacy between the brothers and sister. The written statement was sworn to before the Judge of the county Court of Morgan county, on the 23d of May, and ordered to be recorded.

James T. Sykes, the administrator, and Joseph Sykes, as guardian for the infant, James Sykes, answered: They admit the deceased died at the time mentioned in the bill, leaving two quarter sections of land, and ten or twelve negroes; but deny the intestacy. Joseph Sykes says that the deceased had been sick for ten or twelve days, part of the time being pretty well, walking about in the early part of his sickness, and until about one week before he died, when he was taken very ill, and confined to his bed; that he believes he was of sound mind and sensible, when he declared his will; he referred to the sworn statement as being true, and stated it was reduced to writing on the

**JANUARY 1830.** 4th of February, about two days after the words spoken; that the words were spoken in his presence, alone at the time, but that he had declared the same intention to two other persons, about the 20th of January previous. They answer, they believe fully his intention was as expressed. They further answer, that the deceased became partially insane some time in the night after making this will, and so continued till his death, which occurred about thirty hours after. The answer further states, that the deceased appeared to be under the belief, when he spoke the words, that he would die. It is also denied that the words were casually spoken, but that the questions were asked, and the inquiry made fairly with the view and purpose to learn what disposition the deceased wished to be made of his property after his decease.

Murphy, a witness for the defendants, deposed that the deceased stated, about a month before his death, that he was very much attached to his brother James, and that if he were then to die, he would bequeath him all his property; and that if he were married, and had no children, he would leave him one half of his estate.

Bulloch, another witness, deposed, that about fifteen or twenty days before his decease, the intestate said, that in case of his death, he wished his brother James to have the whole of his property.

Sturgis, says he visited the deceased as a physician, and that, with the exception of three or four hours, he was with him from an hour before sunset on Friday evening, till his decease, which occurred on Saturday night, about two o'clock; that during that time, he was not in a situation to have made any disposition of his property, or to come to a correct conclusion on any subject; that he was too weak to have written a will, and delirious.

It was admitted, that during the illness of the deceased, he had every ordinary facility to have written his will, as pen, ink, paper and attending friends; and that he could write, when physically able. Also, that the deceased had declared himself more partial to his brother James, who had come with him to this country, and lived with him at the time of his death, than towards his other brothers and sister, who lived in Virginia.

The cause was heard before Judge Gayle, at April term 1828, who rendered a decree, dismissing the bill, and establishing the will. To reverse which decree, the complainants sued their writ of error to this Court.

CLAY and M'CLUNG, for the appellants, argued that the evidence was insufficient to establish the words as a will; that they were not intended by the deceased as a will, and that no words could be established as a nuncupative will, unless spoken *in extremis*, and when there was neither time nor opportunity to make a written will. <sup>a</sup>

HOPKINS and BRANDON, contra, argued that the decree was proper, because: 1st, one witness is sufficient to establish a nuncupative will, and it is sufficient to prove by evidence the *animus testandi* of the deceased. <sup>b</sup> 2d, the proof establishes that the will was made according to his intention long before expressed; <sup>c</sup> and 3d, because it was made at his own house, in his last sickness, just before he died, and he was unable after making it, to have made or written any other. <sup>d</sup>

By JUDGE WHITE. In revising this decision, two main questions present themselves for our consideration: First, did the words spoken by the deceased, on the Friday before his death, manifest with sufficient legal certainty, that they were intended as his will; and secondly, were they spoken in that extremity in which alone the law authorizes a nuncupative will to be made. Toller, defines a will or testament to be "a legal declaration of a party's intentions, which he directs to be performed, after his death." When this declaration is reduced to writing, with the ordinary solemnities, there remains no question as to the intent of the testator to make his will. And if I mistake not, an examination of the cases at common law, of the disposition of personal estates by testament, will shew that the Courts have, at all times, been particularly careful to see that the *animus testandi* was fully proven before they would establish a will. Hence, even the reducing of a man's intention to writing, or directing it to be done, would not, if left incomplete, except under peculiar circumstances, be considered as his will; and the policy of our law has been from the earliest ages, to favor written wills; one motive for which, no doubt was, that the design of the testator might be clearly exhibited. Even in the days of remote antiquity, when reading and writing were such rare accomplishments as to confer peculiar privileges, nuncupative wills were not established, except when made *in extremis*; and experience soon taught our forefathers, that the license of the common law,

JANUARY 1830.

Sykes et al.  
v.  
Sykes et al.

<sup>a</sup> Laws of Ala.  
983-4. 20  
John. Rep.  
502. 2 Blkst:  
Com. 500.

<sup>b</sup> Laws of Ala.  
882-3-4. 3  
Thomas'  
Coke, 341-2-  
3 & notes 29  
and 8.

<sup>c</sup> 2 Blk. Com.  
500-1-2-3 and  
note 16. 1  
Munf. R. 456.

<sup>d</sup> Blkst. Com.  
501-2-3, note  
16. Toller's  
Executors, 3-  
4, note 2, 59.  
4 Henn. &  
Munf. 91.



JANUARY 1830.

Sykes et al.

v.  
Sykes et al.

though narrowed to so small a compass, was still too great for the good of society. The celebrated case of *Coles v. Mordaunt*, in the 28th of *Charles II.*, in which it is reported, that out of nine witnesses, sworn to prove a nuncupative will, almost all were perjured, and Mrs. Coles, herself, guilty of subornation of perjury, manifested that the temptation was too strong for human nature, and led soon after to the salutary statute of the 29th of *Charles II.*, which with but slight variations, has been incorporated into our code. The numerous precautions and requirements of this statute have almost, (to use the language of Blackstone,) brought nuncupative wills into entire disuse. Great particularity is necessary to establish them, and nothing is of more importance than a clear manifestation of the *animus testandi*; therefore it is, that the statute requires that "the testator should call on the persons present at the time of making such will, or some of them, to take notice, or bear testimony, that such was his will, or to that effect."

In the case before us, there was no particular call on the witness to take notice, &c. but it is contended that it was to that effect. What the deceased said, was in answer to a question put to him by the witness. This, of itself, does not prove that he had not the requisite *animus testandi*; but we are sustained by high authority in saying, that in such a case the Court should be more upon their guard against importunity, more jealous of capacity, and more strict to require evidence of clear intention than in ordinary cases. The facts shew, that in previous conversations, the deceased had expressed the same design to leave his property to his brother James, which he did on the Friday before his death; and as there was nothing peculiar in his last expressions on the subject, it may be fairly argued, that though they, together with what he had before said, evinced the inclination of his mind as to the disposition of his property, yet, that he did not intend them as the declaration of his will. Had this been his design, it is both reasonable and natural to suppose, that he would have accompanied his expressions with words more emphatic and unequivocal; and if we admit that he was conscious of the near approach of his dissolution, it is stranger still, that when the subject was brought to his recollection, by the question of the witness, he did not avail himself of the few remaining moments, either to have his will written, or to express it with a clear and unambigu-

JANUARY 1830.

Sykes et al.

v.

Sykes et al.

ous manner and intent. To me, it is evident, that though he did design to leave his property to his brother James; yet, either from a fluctuating state of mind, an unwillingness to do an act which brought the contemplation of death immediately before him, or deceived by a delusive hope of recovery, he did not make, or at any one time design to make his will, within either the words or spirit of the statute. As to the second point, it is worthy of remark, that our statute adopts the words of the 29th of *Charles II.*, that nuncupative wills must be made "in the time of the last sickness;" and these expressions, as appears by the case cited from 20th Johnson, 502, have been construed by the Courts to mean, *in extremis*. These latter expressions, as appears from the same authority, were understood by the writers before the 29th of *Charles II.*, when applied to this subject, to mean the veriest extremity, when a man, in the words of Perkins, "lieth languishing for fear of sudden death, and dareth not to stay the writing of his testament." Chancellor Kent sustains the same idea, by observing, that there is a strong analogy between these nuncupative wills, and a gift upon the death bed, or a *donatio causa mortis*, and these gifts, he says, are defined in the very terms of a proper nuncupative will. A *donatio causa mortis*, is where a man lies in extremity, or being surprised by sickness, and not having an opportunity of making his will, but lest he should die before he should make it; gives away personal property with his own hands." Then, to apply these explanations of *in extremis* or last sickness, to the case at bar, the deceased had time, had he been so disposed, after his expressions referred to, to have procured the writing of his will; he had friends and all the ordinary facilities at hand; but he did not do it, or express a desire to have it done. He must then, either have been indisposed at the time to make his testament, or aroused by the perilous extremity of his condition; he would have evinced something of that hurried anxiety which fearful necessity seldom fails to produce. Nothing, however, of this is in proof, but a simple expression only, that if he should die, (implying at least some degree of doubt,) he wished his brother James to have all his property. Upon the whole, I am well satisfied, that the indispensable requisite of the *animus testandi* is wanting in the case, and that it is perhaps more than doubtful, whether the deceased, at the time of using the expressions recorded as his will, was in that

JANUARY 1830.

Sykes et al.

v.

Sykes et al.

extremity of condition, which would authorize him to make a nuncupative will. The decree then, dismissing the bill, was erroneous and must be reversed, and this Court proceeding to render such decree as should have been made below, order, adjudge and decree, that said nuncupative will be vacated, and set aside and that James T. Sykes, the administrator, proceed to distribute the estate of said John Sykes, deceased, according to law.

Decree reversed and rendered.

### DAVIS v. DICKSON et al.

1. In debt on a guardian's bond, it is sufficient if the breaches are assigned in the replication, and it is not error that the declaration is on the penalty merely.
2. Such action must be in the name of the Judge of the County Court, for the use of the person injured.
3. It is however sufficient, if the declaration shews for whose use the suit is brought, it is not indispensable that it appear in the writ.
4. Nor is it necessary that it appear in the declaration in what particular manner he has become interested.
5. The bringing of the suit is sufficient evidence that the person injured requested it to be instituted.
6. Where a party pleads in abatement to the writ and declaration, and the plea is overruled on demurrer, he cannot insist on the same matter in arrest of judgment, if he has pleaded over.
7. The record contained three pleas, which were demurred to, but no disposition of them appeared. There was a trial on the merits, and motion in arrest of judgment. Held, that the motion in arrest was an abandonment of the pleas.

THIS was an action of debt in Franklin Circuit Court, in which "James Davis, Judge of the County Court of Franklin county, successor of William Lucas," was plaintiff, and "Michael Dickson and John Davis" were defendants, instituted in 1824, to recover on a bond made by Dickson as principal, and Davis and one Thomas, as his securities, dated in May 1820, payable to Lucas, as Chief Justice of the County Court of Franklin county, and his successors in office, in the penalty of \$20,000, conditioned, that Dickson, who had been appointed guardian of Nancy Rogers, an infant, should well and truly perform the duties of guardian. The declaration was on the penalty of the bond, without noticing the condition, or assigning special breaches, the usual breach only of non-payment of the money

being alleged; and in the declaration, it was stated that the suit was brought "for the use of Thomas W. Shearon," which did not appear in the writ. The defendants cravedoyer of the bond and condition, and pleaded in abatement to the writ and declaration, because it did not appear in the writ what right James Davis had to sue, or for whose use the suit was brought, and because, by the declaration, it appeared to be for the use of Shearon on a guardian's bond, when it did not appear that he had any interest, &c. This plea was demurred to, and the demurrer was, by the Circuit Court overruled. The defendants then pleaded four pleas. To the three first pleas, the plaintiff demurred, but the record does not shew that any disposition was made of these demurrers.

JANUARY 1830.

Davis  
v.  
Dickson et al.

The fourth plea, after cravingoyer of the bond and setting out the condition, averred performance of the condition; to which the plaintiff replied, assigning breaches, and to this there was a general rejoinder and issue to the country. At March term 1828, the plaintiff obtained a verdict for \$9,680 20, and judgment was entered for \$20,000, which might be discharged upon the payment of \$9,680 20.

The defendants moved that this judgment be arrested, for the following reasons: 1st, that there was no cause of action in the plaintiff's declaration. 2d. That it did not appear that James Davis had any right to commence the action. 3d. That it does not appear in the original writ, for whose use the suit is brought. 4th. That the declaration was on the bond of the guardian of Nancy Rogers, for the use of Shearon, without shewing what interest Shearon had in the action, or how he became entitled to an action on the bond. 5th. That the original writ did not shew any cause of action, or that James Davis had any right to sue. 6th. That it did not appear from the writ or declaration, that any one had sustained an injury, nor did the writ disclose for whose use the suit was commenced. And 7th, that the writ and declaration shewed no default in Dickson as guardian. On these reasons, the Circuit Court arrested the judgment, and to reverse this decision, the plaintiff prosecuted his writ of error to this Court.

HOPKINS and W. B. MARTIN, for the plaintiff in error. There is no error in the writ and declaration, but if there was, the same matters which were relied on to arrest the judgment, were previously pleaded in abatement, and af-

JANUARY 1880.

Davis  
v.  
Dickson et al.

<sup>a</sup> Minor's  
Alab. R. 84-  
178.

<sup>b</sup> 1 Fonb. Eq.  
315. 13 John.  
R. 437. 2  
Day's R. 112.  
Laws of Al-  
abama, 176-  
189-383-385.  
Statutes of  
Jeffails of  
1824 & 1825.

<sup>c</sup> Minor's Ala.  
R. 178.

ter the determination of the demurrer to that plea, the defendants elected their course, and pleaded over; thereby they waived all benefit of the objection. If they wished to insist on those matters, they should have relied on the plea, and not pleaded over. <sup>a</sup> There was a full and fair trial on the merits, and a verdict for the plaintiff. All errors were waived by going to trial without relying on the pleas, if any had previously intervened. <sup>b</sup>

GAYLE, for the defendants.

By JUDGE TAYLOR. The plaintiff in error is understood to insist, that the judgment below should be reversed for the following reasons, viz. 1st. There was no error in the writ, declaration or other proceeding below. 2d. The plea in abatement included all the ground taken on the motion to arrest the judgment, and the defendants submitted to the correctness of the decision on the demurrer to that plea, by pleading over, and thereby waiving their right to any advantage on account of that error. 3d. In arresting the judgment, the Circuit Court revised and reversed its own decision, which had been made in sustaining the demurrer to the plea in abatement, which it could not do. 4th. That all the errors in the pleadings, if any there be, are cured by the verdict.

In the case of *Parks & Burke v. Greening*, <sup>c</sup> it was decided by this Court, that if a defendant submits to plead over after a demurrer to his plea in abatement is sustained, he acquiesces in the decision of the Court, and cannot afterwards have that opinion reversed. There is no disposition now felt to disturb this decision; and certainly by applying it to this case, the investigation might be considerably shortened. But the Court is willing to settle the points which have been raised in the cause, without taking shelter under this rule. I will, therefore proceed to examine the reasons assigned on the motion made in the Circuit Court to arrest the judgment.

The first is, "that there is no cause of action in the plaintiff's declaration." I understand this to mean, and it has been so argued by counsel, that the declaration is insufficient in not setting out the condition of the bond, and assigning breaches thereof. Previous to the statute, 8 and 9 *William III.*, in actions instituted on penal bonds, the plaintiff had judgment and sued out execution for the full amount of the penalty, where a breach of the condi-

tion was proved. At that period, suits were always brought, and plaintiff's declared for the amount of the bond; the declaration simply recited the amount for which the bond was given, and averred a breach in the non-payment of that sum;<sup>a</sup> the defendant then cravedoyer of the bond and condition, and pleaded performance of the condition; whereupon the plaintiff replied, assigning breaches, upon which the parties went to trial, and if the plaintiff proved a breach of the condition by the defendant, he had judgment and execution for the whole amount of the bond, without regard to the damages, which he really might have sustained. The great injustice which was often done by judgments of this description, induced Courts of Chancery to interfere at an early day, by injoining the amount of the judgment, except the damages actually sustained. The statute above mentioned, was passed with the single object of enabling Courts of law to do that justice, for which a resort to Chancery had been necessary. It was not the intention of the framers of the law to vary the remedy further than was necessary to secure the right. Plaintiffs were authorised to assign as many breaches as they thought right, when, before, only one was permitted to be assigned. But the reason of this is obvious. Previous to the statute, the proof of any one breach, was sufficient to fix the defendant with the whole amount of the bond, and it would have encumbered the record, and increased the expenses of the suit, by adding more, without producing any corresponding advantage. But after this statute was passed, the recovery was proportioned to the injury, and as every additional breach produced an additional injury, of course it became essential to the plaintiffs right to permit him to assign as many as he could hope to prove. But it was of no importance that he should make this assignment in any way different under the statute, from what had been customary at common law; accordingly we find the statute altogether silent on this subject; and that the practice formerly pursued, is still retained in England.<sup>b</sup>

But it is urged by the counsel for the defendant, that there is no instance in which the law authorizes Judges of County Courts, as such, to take bonds for the mere payment of money. That all the bonds which they are permitted to take officially, must be given with conditions, to be discharged by the performance of some duty; that the declaration must shew, that a bond thus taken, is not a

JANUARY 1839.

David  
v.  
Dickson et al.

<sup>a</sup> See 1 Williams' Saund.  
51.

<sup>b</sup> See 1 Williams' Saund.  
73.

JANUARY 1830.

*Davis*  
v.  
*Dickson et al.*

mere money bond, or it does not accord with the statute which gives the authority. This objection may be answered in different ways. For aught that appears on the declaration in the present case, except that the suit is brought by the plaintiff as successor of William Lucas, the words "Judge of the County Court of Franklin county," might have been mere words of description, and it would have devolved upon the defendant to shew they were not. But if the bond was taken officially, this must be made to appear in some part of the record, and a defence would be equally available if the breaches are assigned in the replication, or suggested on the roll, as when such assignment is made in the declaration. The 24th section of the act of the Mississippi Territory, passed in 1811, entitled "an act, regulating judicial proceedings in certain cases, and for other purposes," so far as this point has been considered, corresponds with the statute of *William III.* I am therefore of opinion, that there is cause of action in the plaintiff's declaration.

The second reason given on the motion in arrest of judgment, is, that "it does not appear from the proceedings in the said cause, that said James Davis had any right to commence an action."

*a* *Laws of Ala.*  
383.

By an act passed in 1803, <sup>a</sup> the power of appointing guardians to minor's, is vested in the Chief Justice of the Orphan's Court. The Chief Justice of the Orphan's and of the County Court, was at that time one and the same person, and there was an officer of this kind in each county. It has not been contended in argument that this bond is void, because it was given to "William Lucas, Chief Justice of the County Court," instead of "William Lucas, Chief Justice of the Orphan's Court." This point was not made below, nor could it now be here; and if it could, I do not believe it would avail the defendant any thing to raise it.

By the 25th section of the act last referred to, it is provided that "bonds given by executors, administrators and guardians, and all other bonds taken in the said Court, shall be made payable to the said Chief Justice, and his successors in office. By the 39th section of the same act, it is declared, "that in case any bond become forfeited, it shall and may be lawful for the Chief Justice of the Orphan's Court, to cause the same to be prosecuted at the request of any party grieved by such forfeiture, and it shall not become void upon the first recovery," &c. The

bond, which is the foundation of this action, was taken by JANUARY 1830.  
virtue of this statute.

After the adoption of our constitution, and the admission of Alabama into the Union as a State, viz. in 1821, our County Court system was recognized; a County Court, consisting of one Judge, was established in each county, and in him was vested all the powers previously exercised by the Chief Justice of the Orphan's and County Court. The law making this change in the County Court system, enlarges, in some instances the jurisdiction of the Court, and specifies many of the powers of the Judge. It defines, at considerable length, the manner in which letters testamentary and of administration shall be granted by him, prescribes the form of a bond to be executed by executors, administrators or guardians, and in the same section in which that form is prescribed,<sup>a</sup> and immediately after, there is the following provision: "Such bond shall not become void on the first recovery, and may be put in suit, and prosecuted from time to time, against all or any one or more of the obligors, in the name, and at the costs of any person or persons injured by a breach thereof, until the whole penalty shall be recovered thereon."

It is urged by the defendant's counsel, that this provision is the one, and the only one, under which the action on the bond sued on in this case, could have been properly instituted; that it should have been brought "in the name of the person injured," and not in that of the Judge of the County Court. It has already been decided by this Court, in the case of *Murphy v. May*,<sup>b</sup> that the correct construction of this clause is, that the action should be brought in the name of the obligee for the use of the person interested; thereby effecting the object of the act in making the party seeking the redress responsible for the costs. I would hesitate long before I could consent to introduce such an anomaly in practice, as an action in the name of one man on a bond given to another, without an assignment.

The 20th section of this act of 1821, contains a provision which embraces, in its commencement, a bond of this description. It begins by declaring "that all bonds and recognizances, which may have been given or made payable to the justices of any County Court, or Orphan's Court, or to the Chief Justice of such Courts, heretofore established by the laws of the Mississippi Territory, or of the Alabama Territory, or of this State, shall enure and

Davis -  
v.  
Dickson et al.

<sup>a</sup> Sec 13, page  
196.

<sup>b</sup> 1 Stewart's  
R.



JANUARY 1830.

Davis  
 v.  
 Dickson et al.

be payable to the Judge of the County Court of such county, and his successors in office." Thus far the section is plainly applicable; the only difficulty results from the words which follow those last recited, which are these, viz. "for the use of the county, and suits may be prosecuted, and judgments recovered thereon, in the name of such Judge, or any of his successors, &c. It is not to be supposed that the General Assembly intended, that executors, administrators and guardians bonds should be sued on for the use of the county; there is no doubt that this clause of the section was intended to refer to recognizances on bonds of a public nature, the money arising from which, was to be paid into the county treasury when collected; and I consider the inference fair, that on other bonds it was intended that suits should be brought in the same way, that is to say, in the name of the Judge of the County Court, for the use of the person interested.

I come now to consider the 3d reason for the motion in arrest of judgment, viz. "there is nothing in the original writ which shews for whose use the suit is brought." The object of the law in requiring that suits of this description shall be brought for the use of the person injured, or alleging himself so to be, has already been explained. In this way, the Judge of the County Court is to be protected from responsibility for costs. This also, is the exposition given of the statute in the case just cited, of *Murphy v. May*, in which case a judgment sustaining a demurrer to the declaration on the ground that it did not appear for whose use the suit was brought, was affirmed. But it has no where been determined, that this should appear in the writ. In the present case, the declaration does set out, that the suit is brought for the use of Thomas W. Shearson, thereby rendering him liable to a judgment for costs in the event of a successful defence. For my own part, however, I should feel much inclined, were it necessary, to overrule the opinion in the case of *Murphy v. May*; that decision would seem to preclude the Judge of the County Court from protecting the rights of minors, by voluntarily instituting actions on the bonds of guardians, executors, &c. It certainly would never be determined, that if he saw the estate wasting away by the misconduct of persons filling these trusts, that it would not be in his power to protect the interests of infants, by instituting actions on the bonds of the trustees for their benefit, although they might be too young to be aware of the jeopardy in which

their property was placed, and of course could make no request which would render them responsible for the costs.

JANUARY 1839.

Davis

v.

Dickson et al.

The 4th reason offered in arrest of judgment is, that the declaration does not shew what interest Thomas W. Shearon, for whose use the suit is prosecuted, has in the estate of Nancy Rogers, the infant, to secure whose rights the bond was given. It is clearly unnecessary that any thing of the kind should have been shewn by the plaintiff; whether the defendant would have been permitted by plea or otherwise, to bring this point before the Court, it is not necessary now to determine. It may probably be a fact which the Judge of the County Court is alone to decide on, when the application is made to him to bring the suit; and it might render him responsible to those really interested, were he to permit a stranger, by the use of his name, to receive money to which others were entitled.

The subsequent reasons are included in those already considered. It has been argued, however, that the proceedings are fatal in not shewing that the person for whose use the suit is brought, had requested the plaintiff to institute the action. This is believed to be proved by the institution of the suit itself. Whenever an action is brought on a bond of this description, for the use of any third person, it is to be inferred that he has directed the Judge of the County Court to bring the suit; and if this presumption be untrue, he has an easy mode of making it appear by dismissing the suit.

Since writing the foregoing, I have read the opinion delivered in this Court, in the case of *Fugua v. Stone*.<sup>a</sup> The proceedings and judgment of the Circuit Court in that case were so evidently erroneous, that it is probable it went off without argument or much consideration. I am entirely prepared to overrule so much of that decision as relates to the necessity of assigning breaches in the declaration. The judgment in this case must be reversed; but the question recurs, whether is the cause to be remanded, or such judgment rendered here, as should have been rendered in the Court below.

<sup>a</sup> 1 Stewart's  
R. 435.

It does not appear that any disposition was made by the Circuit Court, of the demurrer to the three first pleas of the defendant; and it was insisted by the defendant's counsel in the argument, that if the judgment should be reversed, the cause should be remanded, that the demurrer to those pleas may be disposed of. A majority of the

JANUARY 1830.

Davis  
v.  
Dickson et al.

Court is of opinion, that the defendant abandoned those pleas, by moving in arrest of judgment before any decision of the Court had been pronounced upon them.

The Court here, therefore, must proceed to render such judgment on the verdict as should have been rendered by the Court below.

Judgment reversed and rendered for the plaintiff.

### LUCAS et al. v. ATWOOD et al.

1. The creditors of a copartnership are entitled to be first paid out of the copartnership effects, to the exclusion of the creditors of an individual partner.
2. Chancery will lend its aid to a creditor to pursue an equitable fund for the satisfaction of his debt, provided he cannot obtain satisfaction at law.
3. And when such creditor has subjected such fund by reason of his superior diligence, he will be entitled to retain it, and it will not be subjected to distribution among creditors generally.
4. And the creditor who first applies to Chancery for the benefit of the equitable fund, is entitled to a preference.
5. Courts of equity regard rather matters of substance in determining the rights of parties, than mere technicalities.

THIS was an appeal sued to this Court by John R. Lucas, and Wyman & Clarke, to reverse a decree in equity rendered in the Circuit Court of Madison county, at April term 1828. The facts of the cause are numerous, and the record very voluminous, but so far as material to the decision, they are recited in the opinion delivered by the Chief Justice, and are as follows:

The appellant Lucas was the holder of a note for upwards of \$6,000, made by S. D. Hutchings, & Co. a firm composed of the said S. D. Hutchings, who was Atwood's intestate, and of one Henry C. Bradford; upon this note Lucas brought suit in 1820, on the common law side of Circuit Court, for the county of Madison, against the said Hutchings & Bradford, as partners composing the firm of S. D. Hutchings & Co. Pending the suit, Hutchings died, and his death was suggested on the record, and the suit as to him abated. In 1821, judgment was rendered against Bradford, for the amount of the note, on which judgment, an execution issued against his goods and chattels, &c. which was returned *nulla bona*. After they had given the note, on which Lucas had brought suit, one A. D. Veitch became indebted to the firm in the sum of \$5,000,

for which he gave his note. The copartnership was dissolved in 1820, and by the terms of the dissolution, Bradford assigned all his interest in the firm to Hutchings. On the day after this dissolution, and before it was known, Bradford, without the knowledge of Hutchings, transferred Veitch's note, by indorsement in the name of the firm, to the Planter's and Merchant's Bank of Huntsville, in payment of his own individual debt, due to the bank.

Hutchings, afterwards filed his bill in Chancery against the bank and against Veitch & Bradford; upon which the bank was enjoined from collecting, and Veitch from paying the note. The bill alleged, that the consideration of Veitch's note was for the stock of goods sold by the firm of S. D. Hutchings & Co. and that the firm was greatly in debt, and owed for those very goods for which the note had been received; and prayed that the President and Directors of the bank might be compelled to surrender the note. Pending this suit in Chancery; Hutchings died, and Atwood had the bill revived in his name, as the administrator of Hutchings. Veitch's note was payable in notes on solvent persons, and shortly after the bill was filed, a receiver was appointed to receive from Veitch, notes in discharge of his own, to collect them, and hold the proceeds subject to the further order of the Court. In 1825, the Chancellor made a final decree, so far as the bank was concerned, by which the President and Directors were required to deliver the note up to Atwood, and to pay over to him any money that they had collected on it; and the suit was continued as to Veitch and Bradford.

Immediately after this decree, Lucas, the appellant, filed his bill against Atwood & Veitch, for the purpose of subjecting to the satisfaction of his judgment, such money as might be paid over to Atwood, and the amount that should be ascertained to be due from Veitch on a final hearing, on account of the insolvency of the makers of some of the notes he had placed in the receiver's hands.

Some time after Lucas' bill had been filed, Wyman & Clarke sued the said Henry C. Bradford as surviving copartner, who resided beyond the limits of this State, by an original attachment, and had Veitch garnisheed, who appeared in Court, and answered that he was indebted to Bradford, as survivor, twenty-five hundred dollars, and the Court gave judgment against him for the amount admitted by him to be due, in favor of Wyman & Clarke. Veitch did not disclose to the Circuit Court the pendency

JANUARY 1830.

---

Lucas et al.  
v.  
Atwood et al.

---

JANUARY 1830.

Lucas et al.  
v.  
Atwood et al.

of the bill of Atwood, as survivor, against him and Bradford, the existence of the injunction, nor that Lucas had filed a bill against him and Atwood. After discovering that he had committed himself by his negligence, and that he was likely to have the amount due from him to pay twice, he filed his bill of interpleader against Lucas, Atwood and Wyman & Clarke, and obtained an injunction against the two last, injoining them from proceeding on the judgment they had obtained against him. The insolvency of Hutchings & Bradford at the time of the dissolution of the copartnership, and ever since, was admitted or proven. The bills all came on for a final hearing at the same term, and the Chancellor dismissed Lucas' bill; perpetually enjoined Wyman & Clarke from proceeding on the judgment they had recovered against Veitch; and decreed that Veitch should pay the balance due on his note to Atwood; that the receiver should also pay him what money he held in his hands, and that Atwood should give bond, to pay over the proceeds to the creditors of S. D. Hutchings, & Co. after deducting ten per centum, which he was authorised to retain for his services and trouble. From this decree, Lucas and Wyman & Clarke appealed.

<sup>a</sup> Gow on  
Partnership,  
317-318. 15  
Ves. 562-563.

<sup>b</sup> 1 Montague  
on Part. 142  
& note ss.  
N. Car. R.  
124. Watson  
on Part. 269-  
458 to 462.  
Laws of Ala.  
12.

<sup>c</sup> 2 John. Ch.  
R. 508 Wat.  
on Part. 269.

<sup>d</sup> 9 Cranch,  
160. 14 John.  
R. 63. 2 John.  
Ch. R. 68. 1  
John. R. 580,  
582, 589.

HOPKINS, and KELLY for the appellants. The debt due from Veitch, was a part of the partnership effects of the firm of S. D. Hutchings & Co. and liable exclusively for the payment of the debts due the firm, until such debts were satisfied; <sup>a</sup> and it was liable to the satisfaction of the debt due from the firm to Wyman & Clarke in the mode they pursued. <sup>b</sup> But if the said debt was not liable to the satisfaction of the debt due to Wyman & Clarke, Lucas was entitled to the relief he prayed for in his bill, and the suit of Wyman & Clarke opposed no obstacle to the recovery by Lucas of that part of the note of Veitch, which had been paid to the receiver. <sup>c</sup> The matters alleged by Atwood in his answer, to avoid the debt due from his intestate to Lucas, not being proved, are no defence, and cannot affect the right of Lucas to recover as a creditor of the firm of S. D. Hutchings & Co. <sup>d</sup>

THORNTON, and BRANDON, for the appellees.

By LIPSCOMB, C. Justice. It will be readily perceived, from the facts of the case, that we are now called on to settle a contest among the creditors of the firm of

S. D. Hutchings & Co. who shall be first paid out of the equitable fund, under the control of Chancery, by the decree against the bank. Until that decree had been rendered, there was but little prospect of satisfaction at law or in equity. In order to determine on the rights of the respective claimants, it will not be improper to go back and inquire in what character Atwood became the holder of that fund. If it was in his representative character of administrator of Hutchings, it would seem that he held the fund, subject only to the payment of Hutchings' debts, for so long as Bradford was alive, he could not at law, lose his distinctive character of surviving partner, nor could the representative of his deceased partner, as such sue or be sued, on account of the firm. <sup>a</sup> The bank had, in discharge of the debt of Bradford, received a note due to the firm. Now, had there been no creditors on the joint stock of the firm, the bank could justly have claimed at least Bradford's share of the note at the time it was transferred. But it is a principle too well settled, to require the aid of argument or authority, that all of the copartnership effects must first be subjected to the payment of the debts of the firm, before any part thereof can be applied to the payment of the individual debt of a member of the firm. This doctrine is clearly laid down by Gow on Copartnerships, and by Watson, and every author who has written on the subject. It is founded in reason and morality, and ought to be strictly enforced. If credit has been obtained on the united stock of the firm, all the effects of the firm should be responsible for a credit so acquired. A different rule would have a great tendency to check and cramp trade and commerce, as few would be willing to credit a firm, if the profits in their trade could be taken and applied to the payment of the individual debt of any member of the firm. It was the influence of this principle, governing partnership transactions, based on the fact, that it had been abundantly proved that the copartnership was irretrievably involved in debt, that produced the decree against the bank. At the time of this decree, none of the creditors were known. Atwood, the representative of Hutchings, presented himself to the Chancellor, not as claiming the restitution of the note from the bank, that it might be assets in his hands for the payment of his intestate's debts, but as one under the peculiar circumstances of the case, interested in seeing that there should be no misapplication of the funds of the firm;

JANUARY 1830.

Lucas et al.  
v.  
Atwood et al.

---

<sup>a</sup> See Gow,  
174.

JANUARY 1830.

Lucas et al.

v.

Atwood et al.

the surviving partner had attempted to commit a fraud on the firm creditors, and had eloped. Under such circumstances, the Chancellor was called on to direct some person, in whose integrity he could more safely rely, to manage this fund and hold it subject to such further order as might be thought equitable and just; always having in view the protection, as far as it would go, of the copartnership creditors. There was another consideration in favor of making Atwood the trustee. By the terms of the dissolution of the copartnership of S. D. Hutchings & Co., Bradford had transferred to Hutchings, all his interest in the firm, and had surrendered to him the task of closing the business of the concern, as he expressed it, for the purpose of protecting Hutchings from losses he had individually suffered from the transactions of the firm. This assignment, although it afforded Hutchings no immunity against the debts of the firm, it gave him the control of all settlements relative to it. It will be recollected too, that the evidence shewed that Bradford had eloped, and there was no person to contest Atwood's right to represent the creditors of the firm. It would perhaps, have been more correct, to have directed the proceeds of the notes to be retained by the receiver, for the benefit of creditors, in the order in which they should shew themselves entitled to it; if this had been done, there would have been no pretence for supposing that Atwood had acquired any title to the fund, merely as the administrator of Hutchings. It was not however, considered by the Chancellor, that he was any thing more than the holder of a trust fund, for the benefit of creditors. Had there been an interpleader by a creditor, before the decree against the bank was made, his interest would have been immediately disposed of without remitting him to Atwood; at least, this is the fair presumption from the facts. The decree, however, is not complained of by either of the appellants. It is contended by the counsel for Lucas, that he is entitled to the funds in Atwood's hands, in satisfaction of his judgment against Bradford, on the ground of his superior diligence in pursuing this equitable fund. The principle is believed to be well settled, that a Court of Chancery will lend its aid to the creditor of a firm in the pursuit of an equitable fund, for the satisfaction of his debt; and that he may wait any lapse of time for such a fund resulting from a trust, on condition that he has no remedy remaining at law. This rule was acknowledged as early as the time of Lord Nottingham.

JANUARY 1839

In 1 Peere Williams, a case prior to that time was referred to, in which his Lordship is holden to have said "that a plaintiff must go as far as he can at law, by suing a *fi. fa.* and getting it returned *nulla bona*, and that then he might file a bill." The same doctrine is recognised by Chancellor Kent, in the case of *M'Dermott v. Strong*,<sup>a</sup> and in the two preceeding cases in the same volume, of *Williams v. Brown* and *Brinckerhoff v. Brown*. The principle upon which this rule has been established is, that all the funds of a debtor, whether in equity or at law, should be held subject to the payment of his debts, and as in every other case, if the creditor has a complete remedy at law, he is required to resort to that tribunal. If the fund is an equitable one, in the hands of a trustee, it must be sought through the medium of a Court of Chancery; that a creditor must always obtain judgment at law, and the return of a *fi. fa. nulla bona*, as laid down by Lord Nottingham, in the case above referred to, does seem to me to be subject to some exceptions, if not, and it is one of universal application, it would some times happen that an equitable fund of the debtor would be placed beyond the reach of his creditor.

Lucaset al.  
v.  
Atwood et al.

<sup>a</sup> 4 John. Ch.  
R. 687.

Let us take the facts as presented by the record before us, and see if they would not make out a case, where by this rule, the equitable fund could not be reached. The rule of the Courts of common law require something tangible for its process to operate on; otherwise, there can be no foundation for a judgment. Parties must be brought into Court by personal service, or by their goods and chattels, or lands. Bradford, the surviving partner, is insolvent and has absconded. There is no property belonging to the firm for the process to be served on. How is a creditor to recover judgment at law? The personal representative of the deceased partner could not be sued at law, whilst there was a surviving member of the firm.<sup>a</sup> From this aspect of the case, it does seem to me, that Lucas' bill ought to have been sustained, if he had never resorted to a Court of law to determine the amount of his demand against the firm. How could he sue? Bradford had eloped without leaving any visible property; Hutchings was dead, and his administrator could not have acknowledged the right of priority in a firm creditor, even out of the effects of the firm; the administrator could not have distinguished this debt from that of an individual creditor of Hutchings alone. He had administered on Hutchings' own

<sup>a</sup> See Gow on  
Copartnerships as  
above cited.



JANUARY 1830.

Lucas et al.  
v.  
Atwood et al.

---

personal property, and not on the firm, that could not be administered on; it was still in existence for all the purposes of a legal process, so long as a member of it survived; if they had been all dead, the administrator of the last, would be charged with the settlement of the business of the firm; Hutchings' administrators, if the property was not sufficient to pay his debts, would have been required under the statute of this State, to distribute the effects under the direction of the County Court among the several creditors; but this statute does not extend to copartnership transactions, that his intestate had been engaged in. Where there is a bankrupt or insolvent law applicable to copartnerships, the Court of Chancery will direct a distribution of an equitable fund of an insolvent firm under its control in proportion to the demands of the creditors. But in the absence of such statutes, the rule must prevail, that the creditor who uses superior diligence, must have the preference. Chancellor Kent acknowledges his inability to apportion among creditors in such a case, and whilst he regrets that in the race between contending creditors for a preference, the ends of justice are not always accomplished; he says emphatically, that he knows no rule to authorise a Court of Chancery to apportion an equitable fund of a living person among his creditors.

We will now proceed to take another view of Lucas' rights, as presented on the final hearing of his bill, and contrast them with those of Wyman & Clarke. The last named creditors had obtained a judgment at law against Hutchings alone, perhaps about a year before Lucas obtained his judgment. The process in their favor, was sued out against Hutchings alone, not as a member of the firm, and their whole proceedings at law treated him in the same way, although the evidence of their debt seemed to be against the firm composed of Hutchings & Bradford. They had execution returned no property. About six years afterwards, and after Lucas had filed his bill to subject the equitable funds of the firm to the satisfaction of his debt, Wyman & Clarke commenced suit at law against Bradford, as surviving partner, who resided beyond the limits of this state, by an original attachment, founded on the same cause of action, on which they had recovered judgment against Hutchings, and revived judgment against him as survivor. From their suing Bradford in this form, it does appear, that they had abandoned their judgment against Hutchings, or that they did not consider it a judg-

JANUARY 1880.

Lucas et al.

v.  
Atwood et al.

ment against the firm; they had at all events elected their own tribunal, and if they had applied to one that could not afford them a remedy, the interest of Lucas, who had first applied for the equitable fund, ought not to be postponed in their favor. If, however, they did not lose the advantage of their judgment against Hutchings, by suing his surviving partner, yet that judgment was not against the firm; and for aught that appears to the contrary, they were content at the period of their judgment against Hutchings, to rely on his individual responsibility. How far this judgment, obtained by Wyman & Clarke, against Bradford, survivor, has acquired a lien on the equitable fund, will be now considered. They had obtained judgment against Veitch, as garnishee, by his very culpable negligence, in not disclosing in his answer that he had been required by the Chancellor to pay over the amount in his hands to Atwood; and also, the pendency of Lucas' bill against him; and he ought to be the sufferer for his own inattention to his rights; it ought not to afford him a ground of relief against Lucas. If he had paid the amount condemned in his hands, he could most probably be placed on the footing of a creditor of the firm *pro tanto*; but he would not be a preferred creditor one step beyond the creditor whose substitute he had been made. If Lucas had, by his superior industry, gained a preference over Wyman & Clarke, it could not be taken away from him; Veitch would have been fully protected against Wyman & Clarke; had he disclosed to the Court of law, the orders in Chancery operating on him; the Court of Chancery having assumed jurisdiction of the debt due from him, excluded all other jurisdictions. But for this negligence on the part of Veitch, nothing would have been condemned in his hands as garnishee, and the suit would consequently have failed for the want of something to operate on, as no property had been levied on. If, however, this judgment was regular, and I am not disposed, in this way, to question its correctness, it was much younger than Lucas' judgment, and would therefore, it appears to me, be forced to yield the precedence.

It will now be my purpose to inquire if Lucas' claim to the equitable fund in question, as derived from his judgment and execution, is such as to entitle it to the equitable cognizance of a Court of Chancery. The doctrine of equitable liens, as recognized to be settled by

JANUARY 1830.

Lucas et al.

Atwood et al.

s 4 John. Ch.  
R. 687.

Chancellor Kent, in *M'Dermott v. Strong*,<sup>a</sup> is, that when the creditor has fixed his lien at law, and exhausted his legal remedies, and then resorts to Chancery against equitable assets, his lien in Chancery will relate back to the time when it was acquired at law; this was as to the land of the debtor, at the date of the judgment; and as to the personalty, at the date of the execution. It is insisted, however, by the appellee's counsel, that no judgment has ever been obtained by Lucas, against the firm of Hutchings & Co. but that his judgment was against Bradford alone, and that his execution followed his judgment. This objection, though urged with much force and ability by the counsel for the appellees, does not seem to me available. It will be recollected, that the mere fact of judgment having been rendered against Bradford, and execution returned, no property, was not of itself relied on by the appellants to fix the liability of the firm; but that the whole proceedings in the case at law of Lucas v. Hutchings & Bradford were in evidence on the final hearing; from which it appears, that the suit was instituted against Hutchings & Bradford as composing the firm of S. D. Hutchings & Co. on a note made by them in the name of the firm, that they were both impleaded together. Hutchings then died, before judgment, and his death was suggested on the record, and suit continued and judgment taken against Bradford, without distinguishing him as surviving copartner. If it was at all necessary, that he should have been so called, it was a mere clerical misprision, and could not, it seems to me, affect the judgment. To prove this, let us inquire what was the attitude in which Bradford stood in Court at the period of the suit abating as to his partner by death. Was any set form of words essential to make him survivor, and to charge him as such? No, his destiny had made him such by his outliving his partner. If the record spoke truly when it announced the death of his copartner, he was as clearly made the survivor as if the most apt words in our language had been employed so to denominate him; and the judgment was essentially against him in that character. But admitting that the judgment was not perfect as to form, Chancery should never be astute in seeking out and sustaining slight objections and deviations from mere technical niceties in pleading, for the purpose of rejecting an equitable demand. The plaintiff certainly could have had his judgment formally entered up against Bradford as survivor, and exe-

JANUARY 1830.

Lucas et al.  
v.  
Atwood et al.

---

etion sued out against him as such. If this had been done, according to the opinion of the Chancellor who tried the cause below, and it is conceded by the appellee's counsel, it would have entitled him to a preference. I am of the opinion that the judgment, if good for any purpose, is good against the firm; after Bradford had been impleaded with his copartner as a member of the firm, his relationship to the firm could not be changed. It seems to me that the judgment is good as it is, but if not, that a Court of Chancery should in this case discard mere technical objections, and give the plaintiff, who is appellant, all the beneficial influence that could have resulted from it, had it been entered according to the most approved forms.

I am therefore of opinion, that Lucas had clearly made out his preference under his judgment, and has shewn himself to be the first execution creditor of the firm.

But to return again to an aspect of this case before noticed; suppose that it should be granted that the judgment of Lucas gave him no lien on the copartnership effects, what would be the conclusion drawn from such an admission. If Lucas could not from the peculiar circumstances of the case, go into a Court of law to establish his rights against the copartnership, as I think I have pretty clearly shewn that he could not, it does seem to me that he could resort to a Court of Chancery for relief and for satisfaction out of the trust funds; and if so, his preference would accrue from his having first sought that remedy. At the time he filed his bill, no other creditor had sought satisfaction from this fund, nor has any other since. Wyman & Clarke have not asked the aid of this Court, they have been brought here as defendants by Veitch; they can only be parties to this suit for the purpose of resisting the perpetuity of the injunction, and asserting the benefit of their judgment against Veitch; but it seems they claim no advantage from Veitch if he was not liable on the garnishment, and contend that the proceedings in Chancery ought not to bar their recovery; they are not willing to take advantage of his negligence; if they had insisted on the legal advantage they had gained, I do not see how they could have been deprived of it by the Chancellor, as Veitch would not be permitted to set up in his defence ignorance of what the law required him to do in answering the garnishment. This, however, is not an important consideration, nor is it necessary that it should

JANUARY 1880.

Lucas et al.

v.

Atwood et al.

be disposed of; the point is, that there was no other creditor seeking satisfaction of his debt in Chancery from this trust fund but Lucas, and that he is therefore entitled to the preference.

On both aspects of Lucas' claim, I believe that he is entitled to satisfaction first, and as his claim would absorb the whole fund, it is not necessary to say how the surplus would have been disposed of, if there had been any. The decree below, dismissing Lucas' bill with costs, must be reversed; and a decree rendered in his favor, that both Atwood and the receiver pay over to him the amount of the proceeds of Veitch's note, and that the administrator of A. D. Veitch, who has been made a party, pay over to Lucas any balance that remains unpaid on the note of his intestate, A. D. Veitch; provided, however, that the ten per centum, allowed to be retained by Atwood, may be deducted by the said Atwood, and retained by him as a compensation for his services. It is further ordered and decreed, that the decree perpetuating the injunction against Wyman & Clarke, be affirmed at their costs; and it is further ordered and decreed, that so much of the decree as decreed costs against Veitch, be, and the same is affirmed. And it is further ordered and decreed, that the costs of Lucas v. Atwood and Veitch, and of Atwood v. Veitch & Bradford, be paid out of the trust fund decreed to Lucas.

In this opinion the Court unanimously concur.

### COLLIER V. THE STATE.

1. To sustain an indictment, it is not necessary that the record should shew the mode in which the jurors for the term were drawn. The *se-ri-re* will be presumed legal until the contrary be shewn.
2. It is sufficient, if it appear that the grand jurors were "selected as the statute provides." It is not necessary that it be stated that they were drawn by lot.
3. The whole record and proceedings are before the jury on the trial, and they may examine any part, though not read on the trial.
4. A clerk may lawfully make a certificate of attestation of a record, though he be not within his county.

THIS was a prosecution for larceny, commenced in the Circuit Court of Jackson, which, on application of the

prisoner, had been removed for trial to the Circuit Court of Madison, where he was tried and found guilty, and thence his case, on questions of supposed novelty and difficulty was referred to this Court.

JANUARY 1830.

Collier  
v.  
The State.

In the record, as certified from Jackson county, was copied the *venire facias*, issued by the clerk in Jackson county, and returned by the sheriff; which was tested by the clerk under his hand, but without seal; and it did not appear in the record how the names of the jurors were drawn to be inserted in the *venire*. On the return of the *venire* into Court, the names of those who were summoned are recited, "out of whom, (says the record,) are selected as the statutes in that case provides, to wit: John M. Netherland, foreman, &c. (naming the others,) who being empanelled, sworn, &c." found the indictment, which was afterwards transmitted to Madison county.

At the trial in Madison Circuit Court, the prisoner's counsel objected to the reading of any of the papers transmitted from Jackson county, on the ground that they were not properly in Court. The clerk of the Jackson Circuit Court, stated on oath, that three days before the trial commenced, he came to Huntsville from Jackson county, bringing with him the original papers and transcript, with the certificate thereon, all open and unsealed; that on his arrival in Huntsville, he handed them over to the solicitor unsealed, who kept them till the morning of the trial, when, on their being returned to him, he, in Huntsville, and not in Jackson county, sealed them up, and handed them to the clerk of Madison Circuit Court. But the objection was overruled, and the original indictment was read to the jury.

The prisoner's counsel also moved the Court to quash the indictment, because, 1st. It did not appear that the grand jury of Jackson county, who found the indictment, were selected as required by law; 2d. The record shewed that the grand jury was selected from the original panel, instead of being drawn by lot; and 3d. The *venire facias* had no seal. Those objections were also made by demurrer to the proceedings, but they were all overruled, and the motion to quash was refused.

On the trial, the solicitor having read to the jury the indictment, but having read no more of the transcript from Jackson county, the counsel for the prisoner insisted that the jury should acquit him, on the ground that no part of the record had been read to them shewing the change of

JANUARY 1830.

Collier

v.

The State.

venue. But the Court instructed the jury to disregard this objection, and permitted them to take with them said transcript in their retirement, to which the prisoner objected. These several decisions were certified to this Court for revision.

BRANDON, for the prisoner. I shall waive the objection made for the want of a seal to the *venire*. But the record does not shew that the jurors whose names are inserted in it were drawn by the clerk, &c. as the statute directs; and this cannot be dispensed with. In criminal cases, nothing can be taken by intendment, and here the Court must intend this to have been done, else the law cannot be considered as complied with. Suppose in fact they were not drawn, could the clerk issue the *venire* of his own mere volition? And would the jury be legal unless drawn in the mode prescribed by the statute? All which the statute requires to be done, should be shewn to have been done, and it should appear in the record. This is not a mere directory statute. It directs the doing of an act which otherwise would be unauthorized; it creates a right and duty, and is not merely a statute which for greater certainty and uniformity, points out the mode in which a right or duty already ascertained may be performed. The officers appointed by law to select the jurors, are specially entrusted with the power of determining who shall be lawful jurors. The Court does not in any other way examine the grand jurors when they are sworn, to ascertain if they are lawful jurors, and cannot be informed in any other way, except by the record, that they were drawn according to statute, and that they were lawfully selected. The jury is an exceedingly important branch of our jurisprudence, and should be kept pure with great care, and every guard which the law has given should be enforced to preserve the purity of the grand jury. <sup>a</sup>

<sup>a</sup> Laws of Alabama, page 496. Acts of 1825-6, page 6.

The objection to the authentication of the transcript from Jackson county, is, that the clerk could neither do, nor complete any act as clerk, and requiring his official character, when he was out of the limits of his proper county. The letter and spirit of the constitution shews that it was intended that clerks should only act within the limits of the county for which they are respectively appointed. They are elected for the particular county only, and their authority is co-extensive only with its limits. When the clerk undertook to transport the papers of the

cause from Jackson to Madison, after passing the limits of his county, he lost the character of clerk, and had no more authority than any other messenger. The rule of practice adopted by the Supreme Court, requires the papers to be transmitted, sealed up, &c. Those papers were sent loose and open, and they were out of his hands for several days. It was improper to permit the clerk to swear that the indictment was the proper one. There was but one legal mode known to the law to make it evidence; it was the certificate of the clerk made in his proper county, and transmitted sealed as the rule requires. <sup>a</sup>

The demurrer should have been sustained, because by the record it appeared the grand jury were selected on the return of the *venire*, and not drawn by lot, as required by law. The word used is precisely opposite in meaning to what the statute requires. This statement in the caption of the indictment, must be taken as true, and the demurrer reaches into the caption of the indictment. How then can it be said they were lawfully empanelled, when it is expressly stated they were selected? Suppose it appeared in so many words that the Judge made choice of particular persons out of the names returned on the *venire*, would it be lawful? The statement here is tantamount. The language used, forbids the supposition that they were drawn. <sup>b</sup>

STEWART, for the State.

By JUDGE COLLIER. The questions, as presented, require an opinion on these points:

1. Should it appear from the indictment, or elsewhere on the record, that the jury summoned on the *venire* for the term, were chosen as required by statute, by a particular recital of the manner in which they were chosen?

2. Should it appear *in totidem verbis*, that the grand jury was selected, as the law requires?

3. Can the papers of a cause be taken by the jury in their retirement, if not read to them before?

4. Can a clerk, from whose Court a cause has been removed by change of venue, certify the original papers of the cause, seal them up with a certified copy of the entries in relation to it, and deliver them over to the clerk of the Court to which it is removed, while without his county?

1. No reason suggests itself to us why the indictment, or any other part of the record should discover how the

JANUARY 1839.

Collier  
v.  
The State.

a 1 John Rep.  
498.

b Laws of Alabama, 496, section. 3. 1 Chitt. Crim. law 358, Tom. index 103. Lord Raymond, 1038, 1179. 3 Salk. 187. Strange 598. 1 T. R. 316. 4 Ch. Pl. 241.



JANUARY 1890.

Collier

v.

The State.

panel of jurors were drawn. It is certainly no part of the appropriate office of the indictment; and if it be a material part of the record, we think it sufficiently appears from the *venue* itself, that the jury was regularly drawn. The part of the *venue* to which we have reference, after reciting the names of the jurors, proceeded thus: "being good and lawful jurors of your county, duly appointed as the statutes require." The manner of appointment directed by the statute can be no other than legal, and we must suppose that they were so appointed. By so supposing, the plaintiff in error cannot be prejudiced, for if the jury have not been drawn pursuant to law, he may shew the irregularity to the Court by proof, under an issue adapted to its admissibility.

2. With regard to the second point, it need not appear from any part of the record, that the grand jury was chosen from the panel "by lot;" any words of an equivalent import are equally good as those employed by the statute. It appears from the record, that the grand jury were "selected, as the statutes in that case provides." These words convey to the understanding the idea of being chosen either 'by lot,' or such other way as the statutes require; and are therefore sufficient for all legal purposes.

If, however, it did not appear that the grand jury were drawn pursuant to law, if the record was silent on this point, we should be disinclined to give to the prisoner any benefit from the exception. If the objection was well founded, he might have availed himself of it *by plea in abatement*.

3. In respect to the third point, it is sufficient to say that all the records and proceedings of a cause are considered before the jury when it is submitted to them, and whether read or not, are subject to their examination.

4. On the last point, it is insisted that the law is in favor of the prisoner, because this Court have, where there is a change of venue, directed the original papers, and the entries relative thereto, to be certified and transmitted in a manner different from what they have been in the present case. The rule relied on is the 8th rule for the government of the practice of the Circuit and County Courts, adopted at May term, 1820. So much as is pertinent, is in these words: "Whenever a change of venue shall be awarded, it shall be the duty of the clerk to subjoin to the original papers belonging to the suit, a transcript of all en-

JANUARY 1830.

Collier  
v.  
The State.

tries relative to the same, the whole of which being enclosed under seal, shall be sent by some discreet person to the clerk of the Court to which the suit shall be removed, &c." This rule, it may be remarked, does not require the clerk to certify and seal the papers at any particular place. And if it was competent for him, before its adoption, to do this elsewhere than in the county of which he was clerk, we can discover no reason why he should not be permitted to do so now. In this case, the clerk certifies under his private seal, because he has no official seal. Our reasoning as well our conclusion, is therefore designed for the particular state of fact, leaving the general proposition to be determined when a fit case shall present itself.

In order to make the proper certificates, the clerk should compare his transcript with the minutes of the Court. The original papers are only to be identified with the papers of the cause, and if the clerk is informed as to the correctness of the transcript, and the identity of the papers, he may make a certificate at any place. The case relied on by the plaintiff in error, <sup>a</sup> is not analogous in principle. In that case, a judge, without the State in which he held his office, administered an oath, in regard to some matter within the State. It was held that the administration of the oath was unauthorized, because it was a judicial act. The reason of that case, it must be observed, does not apply to a ministerial act, of which character was the one complained of, and ministerial acts in regard to locality are not controlled in all respects by the same rules which apply to those that are judicial. A judge cannot, when out of the jurisdiction where his duties are to be performed, receive a relinquishment of dower from a feme covert; but he may certify the official character of a clerk of one of his Courts any where. Instead of transmitting the papers and copies of the entries, as expressed in the rule, the clerk might himself have become the bearer, and the respect to which his certificate is entitled as evidence, is not lessened from the circumstance of the solicitor's having had the papers of the cause in his hands before they were certified and delivered by him. By afterwards enveloping and delivering them, he affirmed their genuineness. Again, by the plea of "not guilty," the prisoner admitted himself legally triable on the papers in the Madison Circuit Court; and if he was not, his objections being extrinsic, should have been urged on motion for a new trial.

a 1 John. 497.

JANUARY 1830.

Collier

v.

The State.

Having examined the questions upon the reference, we are of opinion that the judgment must be affirmed.

By JUDGE CRENSHAW. In this case I cannot concur in the judgment now rendered by a majority of the Court. In criminal proceedings, I hold it absolutely essential to extend to the party accused all his rights which he has not expressly waived. No citizen can be legally punished unless he has been prosecuted and convicted in pursuance of a law prescribed, and according to the modes of proceeding, which are legal and constitutional. No feature of our criminal jurisprudence is more sacred than that spirit of tenderness and humanity which pervades the whole system. This is the citadel of safety and protection of our rights and liberties, to which we are to resort in times of tumult and violence, and indeed at all times. If a party is to be infamously punished, his conviction must be clearly according to law, otherwise his punishment is illegal and oppressive.

In the case before the Court, I dissent from the opinion of a majority of the Judges, because the Judge who tried the case had no evidence from which he could legally know that the bill of indictment on which the party was tried, was indeed the true indictment. Suppose it was lawful for the clerk of Jackson, after he had carried the papers of the case from his own office to Madison, to certify in Madison county, that they were the true papers of the case, yet I would ask how could he make such a certificate when the papers had been out of his possession for three days, and when it was impossible for him certainly to know that they were the true papers, though he might have the strongest belief that they were? To say the least of it, I think it a dangerous practice, and it ought not to be tolerated in a criminal proceeding. Furthermore, it was at least doubtful whether it was competent for the clerk of Jackson, out of his office, and in another county, to give a certificate, which was material in a criminal case. And in a criminal proceeding, where the punishment is infamous, I hold that a doubt of the fact or of the law, is tantamount to an acquittal. For these reasons, I am for reversing the judgment, and remanding the case for a trial de novo.

Judgment affirmed.

JUDGE WHITE not sitting.

JANUARY 1839

## LAKE &amp; BARRON V. THE GOVERNOR.

The declaration stated, that the defendant being charged as father of a bastard child, gave bond payable to the Governor in the penalty of \$2,000, to appear before the County Court to answer the charge, and that he failed to appear; and on demurrer, the Court gave judgment for \$500, without a jury. It was held.

1. That the bond under the act of 1811, was properly made payable to the Governor.
2. That the defendant was liable to an action on the bond for failing to appear, though no conviction against him was shewn.
3. That it was not error for the Court to render judgment without a jury, for a less sum than the penalty of the bond.
4. That such bond is not within the statute of 1824, requiring breaches to be assigned.

AN action of debt was instituted in Perry County Court, in 1827, in the name of John Murphy, Governor of Alabama, and successor of I. Pickens, against J. Lake and W. Barron, on a bond executed by them the 31st October, 1825, whereby they bound themselves to said Pickens, Governor, and his successors in office, in the penalty of \$2,000, with condition, that, "whereas, Peggy Hartley, a single woman, hath in, and by her examination, taken in writing, and upon oath, before me, the undersigned, a justice of the peace in and for said county, declared that on the 4th of October instant, she was delivered of a male bastard child, and hath charged the said Lake with having begotten her with child of said bastard: Now, the condition of the above obligation is such, that if the said Lake do and shall appear at the next County Court, to be holden in and for said county, on the second Monday in January next, and shall abide and perform such order or orders as shall be made in the premises, pursuant to the act in such case made and provided, and shall, in the mean time, be of good behaviour, then to be void, &c."

The declaration contained three counts: the first was on the penalty of the bond only, alleging as a breach the non-payment of the money. The second count recited the obligation and condition, and averred that at the January term, 1826, the County Court was not holden, on account of the absence of the Judge, whereby the obligation thereof stood in full force and effect in law to the next term, to wit: July term, 1826, at which time said Lake failed to appear to abide the order of the Court, by means of which the bond became forfeited. The third count was nearly similar, but stated the instrument as a recogni-

JANUARY 1834.

Lake & Bar-  
ronv.  
The Gov'r.

zance. In the writ, and in the several Courts, the damages were laid at \$500. The defendants craved oyer of the bond and condition, and demurred generally.

The County Court, at July term, 1828, overruled the demurrer, and the defendants failing to plead over, judgment was rendered against them for \$500, and this is here assigned for error.

P. N. WILSON for the appellants, argued that the bond was void; that it should have been taken payable to the Judge of the County Court, and not to the Governor; that the declaration was insufficient, because it did not allege that an issue had been tried to ascertain if the obligor was in fact the father of the child; that the mere failure to appear, gave no cause of action, the County Court having made no order, and no further proceedings having been had on said complaint; and that the Court could not lawfully render judgment without inquiring of the damages, and could not, on demurrer, render judgment for \$500, as it was a less amount than the penalty, and was not ascertained by any issue of fact,<sup>a</sup> and when breaches had not been assigned according to the statute.<sup>b</sup>

<sup>a</sup> Laws of Al.  
65.

<sup>b</sup> Acts of 1824.

STEWART, for the defendant in error, relied on the following authorities: 1 Gould's *Espinasse*, 25, 42, 44, 45, 46, 112; 9 *East*, 55; 2 *Strange*, 1156; 1 *Day's cases*, 19; 2 *Burrows*, 772; *Douglass*, 367; *Salkeld*, 659; 3 *East*, 22; 7 *Term*, 300; 1 *Tidd's Practice*, 508, 511; 2 *Bosanquet & Fuller*, 446; 1 *Saunders*, 58, note A; 2 *Caine's Reports*, 327; 3 *Saunders*, 187, note 2; *Laws of Alabama*, 64, 66, 178, 216, 933. *Ante page*, 370.

By JUDGE WHITE. It is not contended that there is any variance between the bond as declared on, and that read upon oyer. But in the first place, it is insisted that the judgment is erroneous, in having been rendered for a less sum than the penalty, by the Court, without the intervention of a jury. To this, it may be answered that the plaintiffs here cannot be heard to complain of that as an error, which is manifestly for their own advantage. Again, the statute of 1811, concerning bastardy, prescribes no particular amount in which the justice is required to take the appearance bond. The design, however, was to enforce the appearance of the reputed father, that he might be re-bound by the County Court, to prevent the child

from becoming chargeable on the county; and as the law limits the sum in which he would have been re-bound, had he appeared, to five hundred dollars, it is at least reasonable that he should forfeit that amount for not appearing. It is further contended, that, after the overruling of the demurrer, there should have been an assignment of breaches on the roll, and an assessment of damages, in conformity to the provisions of the act of December 20th, 1824. Though the language of this statute is very broad and comprehensive, it is not sufficiently so to embrace a bond like the one under consideration. If breaches had been assigned, and an attempt made to assess damages, by what data or criterion could they have been ascertained? No specific injury had been sustained, though one was apprehended, and that too, not to an individual, but to the county. This injury, from its very nature, was unsusceptible of admeasurement in anticipation of the expense that might be incurred. Another reason why it was unnecessary, if it would not have been improper, to have assessed the forfeiture by means of a jury, is, that the reputed father should not be held responsible, for not appearing, in a greater sum than he would have been made to pay upon appearance, and as the statute leaves this with the court under the restriction before mentioned, there was no necessity for a jury.

As to the objection, that the defendants were not liable until it was ascertained by the finding of a jury that Lake was the father of the child as charged, this is founded, in part, on the supposition that this fact could not be taken for granted for any purpose, or ascertained in any other way. The 3d section of the act of 1811, does provide, "that the court shall cause an issue to be made up, whether the reputed father is the real father of the child;" and it further provides, that he shall have a right to appear by himself or counsel, and controvert by legal evidence, the charge alleged against him. But the amendatory act of 1816, <sup>a</sup> modifies this provision, so as to make the necessity of ascertaining this fact, by the finding of a jury, depend on the will of the father. Its words are, "that hereafter, when a cause of bastardy shall be returned to the County Court, under the authority of the act of which this is an amendment, the said County Court shall have power and authority to cause to be summoned and empanelled a jury in the same manner as tales jurors are summoned, for the purpose of trying the issue of bastardy, if the defen-

JANUARY 1834.

Lake & Bar-  
ron  
v.  
The Gov't.

<sup>a</sup> Laws of Al-  
abama, p.  
66.

JANUARY 1886.

Lake & Bar-  
ronv.  
The Gov'r.

dant or reputed father shall demand the same." Then it is apparent, that since this last law, if the father does not demand a jury, they need not be summoned, but the Court may ascertain the fact of the person charged being the father, upon the oath of the mother. But aside from these considerations, Lake's not appearing, placed him in default, and amounted in legal estimation to an admission of his being the father of the child, and of every other fact necessary to subject him to the forfeiture incurred.

The most difficult question remains to be examined, and that is, whether the bond was properly taken to the Governor. On this subject, the statute is silent, and we are left to determine it from the nature of the proceedings, and the design of the instrument in question. The proceedings are not strictly criminal, neither are they in all respects dissimilar. They are required to be had mainly for the public good, though individual advantage may be the result. In their consequences likewise, they tend, at least, to punish the licentious father, who has been the guilty means of bringing into existence a helpless being, under circumstances of threatening poverty. In these respects, as well as others, they may be said to resemble punishment for crime. The bond too, though not in form a recognizance, is given to secure the attendance of the obligor at court, to effectuate a purpose in which the community at large are interested, and may, therefore, perhaps be embraced within the meaning of the statute, which requires recognizances of every kind whatsoever to be given to the Governor. \* Upon the whole, I can perceive no stronger reason for this bond being given to the Judge of the County Court, or any other person than to the Governor, and as the statute required it, without prescribing to whom it should be executed, we are left to the alternative of pronouncing it good as taken, or defeating the whole-some provisions of the statute itself.

Judgment affirmed.

\* Laws of Al.  
216.

## MILLER V. PENNINGTON.

1. A judgment on an original attachment in a sister State, is *prima facie* evidence of the debt here, though without personal service.
2. There being in the record a plea, and demurrer thereto, undisposed of, the cause must be remanded, and final judgment cannot be here rendered.

THIS was an action of debt brought in Perry Circuit Court in 1824, by W. Miller against J. Pennington, to recover on an exemplification of the record of a judgment obtained by him in Jasper county, Georgia, in 1819, for \$584, and costs. The declaration was in the usual form, founded on said judgment; to which the defendant pleaded *nul tiel record*, and also a special plea in bar. Issue was taken on the first plea, and the second was demurred to. At April term, 1825, the Circuit Court gave judgment for the plaintiff on the plea of *nul tiel record*, and sustained the demurrer to the second plea. At January term, 1827, in this Court, on a writ of error, sued out by Pennington, said judgment was reversed, and the cause was remanded. At November term, 1827, a trial was had, and the plaintiff produced an exemplification of the record in Georgia, which appeared to be on a debt recovered by process of original attachment, which was levied on land, and founded on a bond with condition to make title to land, dated in 1809. The ground of the attachment was, that Pennington was a non-resident of Georgia, and there was no personal service of process on him in Georgia. The Court, on this evidence, gave judgment for the defendant, to which the plaintiff excepted.

Miller now assigns for error, that the issue of *nul tiel record* was improperly determined by the Court, and that there was error in giving judgment for the defendant.<sup>a</sup>

GORDON, PERRY, and BEENE, for the plaintiff in error.

THORINGTON, for the defendant.

<sup>a</sup> 7 Cranch, 481. 3 Whea. 234. 9 Mass. R. 464-5. 1 Peters, 74-8. 1 Day, 168. Act of Cong. of 1790.

By JUDGE COLLIER. The Court below gave judgment for the defendant on the plea of *nul tiel record*, because the suit in Georgia was prosecuted against the defendant by attachment as a non-resident debtor, and it did not appear that he was advised of its pendency. We are of opinion that the exemplification is *prima facie* evidence



JANUARY 1832.

Miller  
v.  
Pennington.

\* Ante page,  
124.

of a valid judgment, and that to shew it to be otherwise, it is necessary that the defendant should impugn its validity by special plea: for any thing appearing to the contrary, the defendant may, while in the State where the attachment was sued out, have acquired a knowledge of its pendency. On the question now involved, the opinion of this Court given at last term, in *Hunt & Candry v. Mayfield*,<sup>a</sup> is deemed decisive.

Though we are of opinion that the Court below erred, we cannot render a judgment here for the sum claimed by the plaintiff, as there appears in the record another plea undisposed of. The judgment below is therefore reversed, and the cause is remanded.

JUDGE TAYLOR not sitting.

#### RUTLEDGE V. RUTLEDGE.

On an appeal from a justice, no exception can be taken on account of the warrant not being under seal.

THIS was a writ of error from Morgan Circuit Court. The suit was commenced by a warrant before a justice of the peace. The warrant was signed by the justice under his hand, but without a seal annexed. The magistrate gave judgment for the plaintiff, from which an appeal was taken to the County Court, where the Court, on motion of the defendant, quashed the warrant, because it was not under seal. The plaintiff prosecuted a writ of error to the Circuit Court, to reverse that decision; but at October term, 1828, the judgment of the County Court was affirmed. The plaintiff now prosecutes his writ of error to this Court, and insists that both the Courts erred, and that the judgment of the Circuit Court should be reversed.

THORNTON, for the plaintiff in error, cited the case of *Perry v. Brown*. Minor's Alabama Reports, 56, and the statute of 1819. Laws of Alabama, page 189, and submitted the cause.

J. W. McCLENS, for the defendant.

By JUDGE COLLIER. This Court in *Perry v. Brown*, in which the same point was presented, under the influence of the 38th section of the act of 1819, "To regulate the proceedings of the Courts of law and equity in this State," held that no exception could be taken on appeal, to the warrant, capias, summons, or other proceeding of the justice of the peace before whom the same was tried; but that the appeal should be tried according to the justice and equity of the case. The judgment is therefore reversed, and the cause remanded.

JANUARY 1830.  
Rutledge  
v.  
Rutledge.

JUDGE PERRY not sitting.

### POPE V. BRANDON, et al.

1. A corporation may assign its effects to a trustee, for the benefit of creditors.
2. Such assignment will be good against a judgment creditor, though the charter provides that the stockholders shall be personally responsible for the debts of the corporation.
3. And the absence of the signatures of the creditors, does not invalidate the deed, it being of all effects, and for the benefit of all creditors unconditionally.
4. Nor is the deed void, because the trustee is the President of the institution, and executes the deed as a grantor as such.
5. Inadequacy of consideration, to invalidate a deed, must be gross and apparent.
6. A judgment rendered during the term, does not relate back to the first day of the term, so as to defeat a *bona fide* purchaser or assignee.
7. The acts or omissions of a trustee cannot defeat the rights of the assenting creditors in the deed of trust, unless they contribute to the wrongful act.

THIS was an action of trespass to try titles, brought by T. & W. Brandon, C. C. Clay, J. W. McClung, and B. Brandon, to recover possession of the lot and building formerly occupied as a banking house, by the Planter's and Merchant's Bank in Huntsville. The action was originally brought against S. Cruse, as tenant in possession, but Leroy Pope claiming the title, he was admitted as defendant. The venue was changed to Morgan county, where the cause was tried at October term, 1828, when a verdict was found for the plaintiffs. The facts were as follows:

At May term, 1826, in Madison Circuit Court, an action of trover brought by T. & W. Brandon against the

JANUARY 1830.

Pope  
v.  
Brandon et al.

---

President, Directors & Co. of the bank, was tried, and judgment rendered for the defendants. At January term, 1828, T & W. Brandon, on a writ of error to the Supreme Court, procured a reversal of that judgment, and a judgment was rendered for them against the bank in that suit, for \$2,292; on the first of February, which was a day of said term, and on the same day, the charter of the bank expired. On the 5th of March, 1828, an execution was issued on this judgment, and it was levied on the banking house and lot, as the property of the bank, and on the 7th April, 1828, it was sold by the sheriff, and purchased by the plaintiffs below for \$1,005, and they received the sheriff's deed for it.

The defence was, that, on the 7th of January, 1828, the same day the Supreme Court commenced its session, the bank had, by a deed of trust, conveyed all its property to Leroy Pope, the plaintiff in error, who was the President of the bank, in trust for the payment of debts, &c. due by the bank.

The deed was executed by Pope, the President, and seven Directors, and also signed by twelve stockholders, and was under the corporate seal of the bank. It recited, that whereas, on the first of February next, the charter of the bank would expire, a considerable portion of their notes still being in circulation, unredeemed, and that the bank owed divers debts, possessed property, and was entitled to debts due to it; and that they were desirous to appropriate their corporate property to the payment of their just debts; that in consideration thereof, and of one dollar paid, they granted to Pope all their property, real and personal, and all effects, credits, notes, accounts, books, vouchers, &c. of all kinds, in trust, to pay, in the first place, all expenses of the trust; secondly, all just claims against the bank in full, if the funds were sufficient, and if not, then rateably; and thirdly, if the effects were more than sufficient, then the surplus to be distributed among the stockholders in their proper proportions. To the deed, was appended a list of notes due, and to become due to the bank, amounting to \$30,473 14, judgments due to the bank, \$22,803 15; and debts due by account \$1053 60; also, a list of property, embracing the banking house, and some furniture, &c. and a list of debts due by individuals to the bank, amounting to \$284 83. The deed was recorded the 23d of February, 1828. Evidence was also introduced by Pope, to prove that he had so-

JANUARY 1850.

Pope

v.

Brandon et al.

cepted the trust, and entered on the discharge of the duties of trustee; that the transaction was of public notoriety in Huntsville; that immediately after the deed was executed, he had taken possession of the property, and had placed it in the possession of S. Cruse, as his agent; that the Cashier of the bank had ceased to be such from the date of the deed; that the Directors never afterwards assembled, except a committee whom they had previously constituted to superintend the destroying of bills taken up by the trustee from circulation; that he had redeemed bills of the bank for more than \$11,000; that he had paid by his own note, with security, \$21,233 60, due by the bank to the United States; that with a portion of the notes transferred to him, he had secured payment of another debt due by the bank, of \$2,500; that about \$12,493 of the debts transferred to him, were due by insolvent persons; that he had procured confessions of judgments on debts to the amount of \$5,000, by giving stays of execution yet unexpired, and that he had obtained judgment for another debt of \$1,400, which was still unsatisfied; also, that a large portion of the judgments mentioned in the lists, were due in notes of the bank. It was also proved that Cruse transacted his own private business in the bank, and that Pope removed all the notes and property to his own house, but that the sign of the bank had continued over the door till the time of trial. A witness stated he believed the bank was able to pay all its debts. On this proof, the presiding Judge instructed the jury, that "if they believed from the evidence, that the said Pope had never made a proposition to T. & W. Brandon, to secure to them a rateable proportion of their said judgment against the bank, that the deed to Pope was fraudulent as to them, and that the plaintiffs were entitled to recover." To this instruction, Pope excepted, and this is now here assigned for error.

HOPKINS, for the plaintiff in error, in argument, insisted on the following propositions:

1. That the deed to Pope, which the instructions admitted was valid when made, could not become void by the acts of the trustee.

2. That for any breach of trust, a Court of Chancery alone is competent to afford a remedy.

3. That the deed was made by a creature of the law in its corporate name, and in the exercise of its lawful powers, to Pope in his individual capacity, and is not void upon

JANUARY 1830.

Pope  
v.  
Brandon et al.

a 2 Cranch,  
127. 12  
Wheat. 83. 3  
Am. Dig. 143

b 4 John. Ch.  
Rep. 522. 11  
Wheat. 87.  
19 John. Rep.  
218. 2 John.  
Ch. R. 182.  
8 John. R.  
352. 4 John.  
Ch. R. 138.

c 4 Day, 146.  
5 Mass. R.  
13 Mass. R.  
146. 2 John.  
Ch. R. 35. 14  
Vesey, 289,  
290. 2 Vesey  
627. 2

Schoales &  
Lefroy, 507.  
17 Mass. R.  
454, 552. 1  
Munroe's R.  
105.

d 4 Munford's  
R. 539, 541.  
13 John. R.  
471.

e 4 Day's R.

the principle which prevents any legal right from being created in favor of a person in his individual capacity, by an obligation upon the same person in the same capacity.<sup>a</sup>

4. That there was no fraud, either actual or constructive in the execution of the deed; and justice, and the interest of the bank and its creditors, required the conveyance which the bank made.<sup>b</sup>

BRANDON, for the defendants. The deed of assignment is void. No adequate consideration is expressed in it for the property conveyed, and no creditor has accepted it.<sup>c</sup> The judgment of T. & W. Brandon, bound the land; a lien credited by judgment has relation back to the commencement of the term at which judgment was obtained.<sup>d</sup> The conveyance made by the directory of the bank was void also, because the Directors exceeded their authority. They were only the agents of the stockholders, appointed to effect certain purposes concerning the monied operations of the bank, and could not assign away the property of the stockholders, particularly by an instrument which was to have an effect after the determination of the corporation. The deed should have been made on the vote of the stockholders of the corporation, and it should appear to have been so made, else it is not evidence.<sup>e</sup> The stockholders are liable for the debts of the institution, and their property also; and if they have not legally assigned away their property, and divested themselves of the right to it, it is still liable to pay their debts.

By JUDGE COLLIER. The record offers for our examination these topics:

1. The character of the deed from the President, Directors, & Co. to the plaintiff, and the sufficiency of its consideration.

2. The lien created by a judgment upon real estate; its nature, how it operates, and when it begins.

3. The legality of the Judge's instructions to the jury.

1. The deed is a conveyance of all the property of the bank, for the payment of its debts, without preference or priority to its creditors. This being professedly the object of the deed, the Messrs Brandon's, with regard to the property conveyed, are as favorably situated as any other creditors. And to ascertain whether they can vary the situation assigned them in the payment of their demand, and subject the property transferred, to the satisfaction

of their judgment, without regard to other creditors, are inquiries into the validity of the deed, which become material.

JANUARY 1836.

Pope

v.  
Brandon et al.

The deed is absolute, and beyond the control of the bank, and therefore does not require, as essential to its operation, the positive assent of any of its creditors. In this respect, there is an obvious dissimilarity between an assignment for the benefit of all creditors, and one which provides only for those creditors, who consent to come in under its provisions. In the one case, the deed provides for no act to be done by the creditor; in the other, there is a provision requiring an express stipulation on his part to be paid as it directs. The reasoning of the Court in *Robinson v. Rapelye & Smith*, recognizes this distinction:<sup>a</sup>

a Ante page.  
86.

The right of a debtor to make a general assignment of his effects for the benefit of his creditors, has not been controverted in argument; but it is insisted that such right does not extend to a trading corporation. On this point, no authority is cited; and as our own resources furnish us with none that favors the idea of a restriction of corporate powers in this particular, we must therefore consider it upon principle. The right of a debtor to vest his property in trustees for the benefit of his creditors, results from the control which every one possesses by law over his own estate. This control continues free from legal restraint until some one else acquires an interest in the same estate. It cannot be that a corporation is under greater restraint in regard to the use and enjoyment of its estate, than a natural person, unless a restriction is imposed by positive law, or may be inferred from its character, and the object of its existence. Chancellor Kent, in speaking of the powers and capacities of corporations, says, "it was incident at common law, to every corporation, to have a capacity to purchase and alien lands, unless they were specially restrained by their charters, or by statute. Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects, nor circumscribed as to quantity. This was so understood by the Court and bar in the modern case of the *Mayor and Commonalty of Colchester v. Lowten*.<sup>b</sup> And this common law right continued in England, until it was taken away as to religious corporations, by several restraining statutes in the reign of Elizabeth."<sup>c</sup> This, we believe to be a correct view of the powers of corporations on the point we are considering. But the right of the bank in this case, to alien its estate,

b 1 Ves. &  
Bea. 226, 237  
240, and 244.

c 2 Kent's  
Com. 227..

JANUARY 1839.

Pope  
v.  
Brandon et al.

a Laws of Al.  
p. 34, section  
4.

b Laws of Al.  
39.

does not depend for its existence upon the common law; it is expressly given by its charter, <sup>a</sup> and must be taken to exist without limitation as to object.

It is argued for the defendants, that it was not competent for the bank to make any disposition of its effects, which would relieve it from the liability to satisfy directly the judgment of the Messrs Brandon's. To sustain this argument, we are referred to the 11th section of the charter, <sup>b</sup> which, after declaring the liability of the stockholders to the payment of the debts of the bank, concludes thus: "but this provision shall not be construed to exempt the said corporation, or the lands, tenements, goods or chattels of the same, from being also liable." This provision was doubtless introduced *ex industria*. The Legislature that enacted the charter, did not intend that the remedy against a stockholder should be exclusive of the appropriate remedy against the corporation; and lest it might be thus unnaturally construed by this provision, they declared the law, and did not introduce a new liability, or impose any restriction upon the bank in the disposition of its estate.

Again, the charter must be construed upon a view of all its parts, and such a construction given, as that every part may be operative, *ut res magis valeat quam pereat*. If the 11th section was to receive the construction insisted on, the 4th section, would, to some extent, be inoperative. They must be both thus construed: the 4th is an authority to sell and dispose of the corporate estate; the 11th makes that estate subject to the payment of the debts of the corporation, until it is sold and disposed of, and thus construing them, each exercises its full scope and effect. Was reason necessary to illustrate further the fallacy of the argument we are examining, the inconvenience that would have resulted from thus uniting the powers of the bank, interposes a powerful objection to its justness. It is essential to the prosperity of a banking institution, that it should be permitted to marshal its resources, free from legislative control, further than policy would dictate. In the progress of its negotiations, it may be compelled to receive real or personal estate, in discharge of the liability of its debtors; and if it were not allowed to change its property into an active capital, its operations might be paralysed, its usefulness impaired, and its business rendered unprofitable. But this objection to the powers of the bank, need not be further examined, for it is apparent from a view of the charter itself, that it has no just foundation.

The defendant's counsel have impugned the deed of assignment, upon a suggestion that it is not sustained by a sufficient consideration. Chancery has lent its aid in some cases, which, are however rare, to avoid a contract founded on a gross inadequacy of consideration; but in these cases the inequality was so great as to shock the understanding of mankind, and to induce the belief that the transaction was fraudulent. It is very clear, that the deed from the bank to the plaintiff is not objectionable for gross inadequacy of consideration. The extent of the consideration is not set forth in the deed; it recites that the bank is indebted to sundry individuals, in the sum of two hundred and eighty-four dollars, and eighty-four cents; and that a large portion of their bills is yet unredeemed. These are directed, with all other debts of the bank, to be paid by the plaintiff. The nominal amount of the evidences of debt, and the estimated value of the property conveyed, is about sixty thousand dollars. Of the debts, twelve thousand dollars and upwards, will be lost by insolvencies. The plaintiff has, since the execution of the deed, paid and secured of the debts owing by the bank, about thirty-five thousand dollars, and it does not appear what amount is now due from it. This statement of facts may suffice to shew, that the suggestion of gross inadequacy of consideration, could it be entertained at law, is not sustained by the record.

The legal validity of the deed is also questioned by the defendant's counsel, upon the supposition, that the plaintiff is both grantor and grantee. It is certainly a correct proposition, that one person cannot occupy *at law* both these situations at the same time, in regard to the same object. But the objection in this instance, it is apprehended, is founded upon a misconception of the nature and effect of the assignment made by the bank. It supposes that Leroy Pope assigns to Leroy Pope, when, in truth, the President, Directors & Co. make a conveyance in their corporate character to the plaintiff. The interest which he had in the property conveyed to him was different from that which he had in property that belonged to him in his individual capacity. Nothing is more usual than for a corporation to derive property by purchase, from a corporation.<sup>a</sup> Transactions between persons thus circumstanced, have been always recognized, and in principle they appear to us unobjectionable. The converse would establish the doctrine, that a bank could not coerce the collection

JANUARY 1830.

Pope  
v.  
Brandon et al.

<sup>a</sup> Waring v.  
Cataw. Co.  
2 Bay. 109.



JANUARY 1830.

Pope  
v.  
Brandon et al.

of a note discounted against one of its stockholders, because he was a creditor; or, that a corporator could not sue the corporation, because he was a constituent part of it. This may be considered strange; yet it is a legitimate deduction from the argument. The deed, so far as the record discloses, is free from any objection of actual fraud, and, as we have shewn, is not in itself constructively fraudulent; hence the property in question could not have been sold under the Messrs Brandon's execution, unless the deed from the bank may be invalidated by an objection other than that of fraud.

2. The deed of assignment to the plaintiff, bears date on the day when the term of this Court commenced, at which the judgment in favor of the Messrs Brandon's was rendered; but the judgment was not rendered until the first day of February, more than twenty days thereafter. From these facts, it is argued for the defendants, that the judgment relates retrospectively to the first day of the term, and from that period created a lien on the real property of the bank, in favor of the Messrs Brandons, which it was not competent for the bank to divest by its transfer on that or any succeeding day. It is a well settled rule of the common law, that a judgment operates to restrain the control of the debtor over his real estate, so as to defeat its satisfaction; but this rule, it is believed, does not give to a judgment a retrospective operation against a *bonafide* assignee. The reason of the rule is founded upon the supposition, that the proceedings of a Court of record, are of public notoriety; and that he who purchases real estate after judgment, purchases with a knowledge of its existence. To give effect to purchases under such circumstances, would be a fraud upon the judgment creditor. The reason, it is apparent, will not extend to give judgments a lien from a period of time anterior to their rendition; for until then, the purchaser cannot be advised of its existence, and consequently cannot be held to have purchased in fraud of a judgment creditor; *cessante ratione, cessat ipse lex*.

The argument of the retrospective influence of judgments is predicated upon the idea, that, as the whole term is considered in law as but one day, every thing done during the term must relate to its commencement. This conclusion does not necessarily follow. It is true that the term of a Court is for some purposes but one day; as a plea put in on the last day of the term, is a plea of the first

day of the term, and upon this idea of continued sitting of the Court, Judges may alter and amend their judgments in the same term. This fiction, like all others, which the law acknowledges is designed to advance, but never to defeat the purposes of justice. *In fictione juris, semper consistit æquitas.* To give a retroactive effect to a judgment, would be rather subversive than promotive of justice, as a purchaser could not be constructively advised of it, until it had an actual existence. So particular have the Courts been in adjusting the question of priority, between the fair purchaser and the judgment creditor, where the deed of sale and the judgment bear date of the same day, that inquiries are allowed to ascertain the precise period of the execution of the one, and the rendition of the other.<sup>a</sup> Having shewn that a judgment can only operate prospectively against a fair purchaser, we are brought to the third and last point of inquiry.

3. Whatever of plausibility or force of argument may be brought in aid of the instructions of the Judge to the jury, these arguments must not be here considered and discussed. They were brought to the view of this Court, in *Robinson v. Rapelye & Smith*, decided at the last term, and in that case fully and satisfactorily examined. In reviewing them, the Court in its opinion, says, "no act of the trustees can affect the assenting creditors, unless they, in some degree, contributed to it, because the trustees are only agents for the assignors." The deed of assignment in that cause provided for the assent of the creditors, by the execution of the deed, many of whom executed it. This provision constitutes the most material difference between that case and the present; yet the principle embraced in the quotation from that opinion, applies here. And let it be conceded that the plaintiff, as trustee, should have proposed to secure to the Messrs Brandons, a rateable amount of their judgment, and omitted this duty; the assignment for that cause could not be avoided, unless it appeared, that in this neglect of duty, the plaintiff was influenced by his assignors; a circumstance which the Judge seems not to have noticed. For this reason, the instruction is erroneous; and for the additional cause, that it supposes the plaintiff was obliged by the deed to offer to secure to the Messrs Brandons a rateable portion of their judgment, when no other obligation was imposed than to pay their judgment *pari passu* with the other creditors. We have been more prolix in expressing our opin-

JANUARY 1830.

Pope  
v.  
Brandon et al.

<sup>a</sup> Ex parte  
Stagg. 1  
Nott & Mc-  
Cord, 405.

JANUARY 1830.

Pope  
v.  
Brandon et al.

ion than was necessary to a decision of the question immediately before the Court, and have considered the material points discussed, which it appeared from the evidence in the record might come up, should the case be remanded. We have taken this course, as it was intimated from the bar, that, should the judgment here be adverse to the defendants on all the points introduced in argument, it would put an end to further controversy.

It is the result of our conclusions upon all the points, that the judgment be reversed, and if the defendants desire it, that the cause be remanded.

Judgment reversed.

#### GARRARD V. ZACHARIAH.

1. When the pleadings are taken in short by consent, no advantage can be taken for informality in them after verdict. The words *replication and issue* will be held to apply to all the pleas.
2. In debt, the pleadings being in short, the verdict found the issues for the plaintiff, and found damages only, omitting to mention the debt: *held* that this was sufficient.

THIS was an action of debt on a promissory note, for \$75, determined in Lauderdale Circuit Court. The declaration was in the usual form, in one count. The defendant plead three special pleas in bar, which are set out in the record, after which appears those words, "*replication*, Marshall, for plaintiff," and "*issue*, Hubbard, for defendant." The entry of judgment is as follows: "Came the parties, by their attorneys, and came also a lawful jury, &c who being duly elected, tried and sworn, well and truly to try the issues joined, upon their oaths do say, they find the issues in favor of the plaintiff, and assess his damages at \$26." On this verdict, the Court rendered judgment for the debt laid in the declaration, and the damages assessed by the jury.

Garrard, who was defendant below, assigns for error, that there was but one issue, and that it does not appear on which plea it was joined; that there are two pleas on which no issue was taken, and that the verdict speaks of issues which do not exist, and on which they could not find; also, that the verdict was insufficient, in not finding

JANUARY 1830

the debt to be due which was the foundation of the action; and that the Court erred in rendering judgment on that verdict.

Garrard  
v.  
Zachariah.

W. B. MARTIN, and HOPKINS for the plaintiff in error.

COALTER, for the defendant.

By LIPSCOMB, C. J. The two first errors assigned, go to the question of the sufficiency of the replication, to the defendant's pleas. We have often held, that when the parties make up their pleadings in this short and careless way, that no advantage shall be taken after verdict. We will consider that the word replication, written and signed by the plaintiff's attorney, by consent, was to go to all of the defendant's pleas, and there can be no doubt but such was the understanding of the parties themselves at the time. The word "issue," signed by the defendant's attorney, strengthens this conclusion. The third point taken by the plaintiff in error is, that the verdict did not authorize the judgment; that it was only for damages, and that the judgment had been entered for debt and damages. This point is as badly taken as the former; when the pleas of the defendant were negatived, by the finding in favor of the plaintiff, the legal result was in favor of the plaintiff for the debt. The pleas all admitted the note which was the foundation of the action, and offered matter in avoidance. Had the defendant plead the general issue, the finding for the plaintiff on that issue, if formally entered, would be his debt and damages. But under the state of the pleading, we consider that the verdict and judgment were not only good, but technically correct.

Let the judgment be affirmed.

JUDGE TAYLOR not sitting.

## CLIFTON V. GRAYSON.

1. A party who procures an illegal arrest to be made, is liable in trespass for false imprisonment, though not present aiding and abetting.
2. It is the province of the Judge to determine on the admissibility of evidence, and for the jury to determine if it proves the facts charged.

CLIFTON declared against Grayson in Lauderdale County Court, in an action of trespass, for an assault and battery, and false imprisonment. The plea was, not guilty. A bill of exceptions taken by the plaintiff, shews, that on the trial, he produced one Kursner, a witness to prove, that he, the witness, had arrested the plaintiff, at the request of the defendant. This evidence was objected to, and rejected by the Court, on the ground that the request of the defendant did not make him a trespasser. The Court then inquired of the witness what the facts were? he answered, that about ten minutes before the arrest, the defendant asked him if he had executed a *ca. sa.* he had against the plaintiff, and being informed he had not, the defendant said he wished him to do so, and informed him where the plaintiff was; that the witness then went over the street to the office of one Ward, and arrested the plaintiff. Ward's office was in sight of the place where the conversation took place, and distant about ninety yards, but the witness did not know if the defendant saw the arrest. The plaintiff's counsel insisted on the exclusion of the fact, that the witness had a *ca. sa.* as not admissable under the issue joined, but contended that the fact of the arrest should go to the jury as evidence. The Court held the evidence inadmissible, unless the defendant was present, aiding and abetting in the arrest, and unless the fact of the witness having the *ca. sa.* as an officer, could also go as evidence to the jury. There was a verdict for the defendant, and the decision of the Judge above stated, is here assigned for error, by Clifton, the plaintiff.

<sup>a</sup> 3 Starkie's  
Ex. 1447, 2  
Wheaton's  
Selayn, 676-  
7.

W. B. MARTIN, for the plaintiff in error, argued that a defendant might be guilty of a false imprisonment, without being present, aiding and abetting, and that therefore the evidence was improperly rejected.<sup>a</sup>

HUTCHISON, contra. A party may be liable for an illegal arrest, though not present aiding and abetting, but this is only in an action on the case; not such an action as this, which is trespass. <sup>a</sup> But be this as it may, there can be no error in the record; for it does not appear there was any illegal arrest. It was certainly not competent for the plaintiff to introduce a witness, and select only a part of his statement, without taking the whole. Then what was his statement? it was, that the defendant directed him to execute a *ca. sa.* and he did so. It was lawful for him to arrest the plaintiff on a *ca. sa.* unless the precept was illegal, which is not shewn or pretended; then there could be no trespass. It could only be by reason of illegality in the process that any one could be liable; and this should have been shewn and relied on.

JANUARY 1830.

Clifton  
v.  
Grayson.

<sup>a</sup> Hardin, 490  
2 Littell, 234,  
11 Mass. 137  
500. 1 Chitt.  
P. 182-9.

By LIPSCOMB, C. J. The witness was offered to prove that he had, at the request of the defendant, arrested and held the plaintiff in custody: the Judge of the County Court would not permit this evidence to go to the jury, on the ground, as he states, that it would not prove that the defendant was a trespasser. This is, as we conceive, the only point presented by the bill of Exceptions. It is true that it contains a great deal more, which seems to be only a conversation for the gratification of the Judge's curiosity, without being permitted by him to go to the jury. If the Judge intended by the reason given for rejecting the testimony offered, to be understood as ruling, that a person who procures the illegal arrest of another, is not a trespasser, we are very clear, that he erred. If he only intended that it was not sufficient to prove the fact of the trespass, then he was trespassing on the privilege of the jury in arresting the evidence from them. It is the province of the Judge to determine on the admissibility of testimony, and for the jury to say, whether it proves the facts charged or not. We can discover no objection to the testimony rejected by the County Court, on the ground of its admissibility, and it should have gone to the jury.

Judgment reversed, and cause remanded.

JANUARY 1829.

## BELL et al v. PAYNE &amp; WILLIAMS.

By the act of the 20th January, 1829, providing for the valuation and sale of certain lands which had been relinquished by purchasers to the United States, and then granted to this State, commissioners were appointed to value the lands, and to ascertain and report who were the persons properly entitled as occupants, to pre-emption rights as purchasers at valuation, and their determination was made final. In this case, it was held:

1. That this Court has a general supervising power over all inferior judicial tribunals which may be erected, to prevent the violation of a positive right.
2. But that the decision of the commissioners as to who was entitled to a pre-emption right, could not be controlled by injunction, as it was a matter of favor, and not of right.
3. That the Legislature may lawfully give power to said commissioners to ascertain who are entitled to pre-emptive rights, without appeal, and that this is not unconstitutional.
4. That the commissioners might, at any time before filing their report, alter their decision.

THIS was motion for an injunction, to restrain the Register of the Land Office at Courtland from receiving entries, or issuing certificates in favor of the defendants, for certain lands. The application was made on the first of October, 1829, to Judge Perry, who granted an injunction, to continue only until the 26th of January; and in this Court, the complainants moved that the injunction be continued and granted generally. The bill was filed by Isaac Bell, Samuel Bell, and George W. Martin, complainants, against Mary Payne and Philemon Williams, defendants.

The motion was argued by ORMOND for the complainants, and HOPKINS, for the defendants.

By JUDGE TAYLOR. The land described in the complainants bill is part of the 400,000 acres granted by the United States to this State, for the purposes specified in the act making such grant.

The whole of the lands thus granted, had been previously sold by the United States to individuals, and in conformity with acts of Congress passed for the relief of the purchasers, had been relinquished by the purchasers to the United States, and the amount which had been paid thereon, applied to the payment of other lands bought of the United States. by the persons making such relinquishments.

The General Assembly of this State passed a law, which was approved by the Governor on the 20th January, 1829,

"to sell and dispose of" the said 400,000 acres of land; by which act, a Land Office was established in the town of Courtland, and a Register appointed, with power to issue certificates of purchase to such persons as were authorized to receive them. The said act also provided for the appointment of twelve commissioners, to examine and value the lands. These commissioners were required to divide themselves into four companies, each of which companies was required to examine, value, &c. and moreover, to "take a note or memorandum of all improvements, and the names of each and every person who may be entitled to pre-emption, according to the provisions of this act." By the 6th section of the act, it is required that the "commissioners when they have completed the examination of the whole of said lands, shall assemble together, and return a list of the class, &c. together with the names and improvements of persons occupying or cultivating, &c. to the Register of the Land Office, &c."

JANUARY 1829

Bell et al.

v.

Payne &amp; Williams.

Hans.

The 8th section of the act is in the following words, viz: "That, to enable the said Register to determine what persons are entitled to such pre-emptions, it shall be the duty of each of said companies of commissioners to ascertain by evidence, satisfactory to them, who is entitled to the pre-emption to any particular tract or tracts of said land, according to the provisions hereafter enacted; and to enable them to settle any disputed claims, they shall be authorized to procure the affidavit of three disinterested neighbors, or other satisfactory testimony, and the said commissioners are each invested with the power of administering oaths to witnesses; and the decision of each company of said commissioners shall be final as to the right of pre-emption, and the said commissioners shall make return thereof as above stated, to the Register."

The bill upon which this motion is founded, alleges that the complainant, Martin, purchased the north east and south east quarters of section 31, in Township 6, range 11, of the United States, in the year 1818, which he afterwards relinquished to the United States, and which are included in the 400,000 acres granted to this State, and that he continued in possession thereof until the 8th of January, 1829, when he rented the same to his complainants, Isaac and Samuel Bell, and agreed that they should have any benefit which they might lawfully derive from the possession of said land, under the act above referred to. The bill then proceeds to set out the manner in which the defendants



JANUARY 1880.

Bell et al.

Payne &amp; Williams.

first settled on a part of said lands; that by a writ of forcible entry and detainer, he had dispossessed the Paynes before the grant was made by the United States to this State; that the three commissioners who acted in that part of the State, in which the above described land lay, after having all the evidence which the several claimants to the right of pre-emption in said land could adduce, awarded the same to the complainants, the Bells; but subsequently, and after one of said commissioners who acted in the first instance had been succeeded by another person, they gave to the said defendants a new trial, and awarded to the said Mary Payne, the pre-emption in the west half of the south-east quarter, and to the said Williams, in the west half of the north-east quarter of the above described land. The bill prays an injunction restraining the Register from permitting said defendants or any other person to enter the land, except said complainants, and for general relief.

This motion is supported by counsel, who take the following positions, viz:

1st. That the possession of the complainant, Martin, obtained by virtue of his purchase, from the United States, which was continued after he relinquished his title to the land, and until after the act of the General Assembly for the sale of the land was passed, vested in him a right of possession against third persons, which would be protected by this Court.

2d. That by virtue of said right of possession, that act of Assembly secured to him a preference in entering the land, and of course, the right to ask the aid of this Court in securing to him such preference.

3d. That if he had no right by virtue of his possession, before the passage of that act, yet the act itself conferred upon him a right valuable in itself, and therefore the subject of adjudication in this Court.

4th. That if either of these positions be sustained, the Legislature had no constitutional power to divest this Court of its jurisdiction, and therefore the provision in the act which makes the adjudication of the commissioners "final," is unconstitutional, and null and void.

5th. That if all these points be untenable, the first decision of the commissioners, by which they determined that the complainants, the Bells, were entitled to the pre-emption, was binding upon them, and vested in them that right, which this Court will protect.

The ground taken with regard to the merits of the con-

troversy, further than they are involved in the points above stated, it is unnecessary to examine. JANUARY 1830

There is no controversy with respect to the intention of the General Assembly, as expressed in the above act; all agree that it was intended to vest each set of commissioners with the power to decide who had the right of pre-emption in the different tracts of land, to a right of preference in which there might be a conflict between different persons, and that from their decision, there should be no appeal; but it is contended that the provision was one which the Legislature had no power to make; that this Court has a general supervising control over all inferior judicial tribunals which may be erected in the State, of which it cannot be deprived.

Bell et al.  
v.  
Payne & Williams.

---

It is certainly true in general, though there are exceptions, that wherever the property of the citizen is involved in any way by the claim of another person, the right of appeal to this Court is secured to him, and no department of the Government can divest this Court of its jurisdiction in such case; but the question here, is, have the complainants or either of them any property in the land in controversy? and I here use the term property, in its broadest sense, including as well the right of possession as the right of property.

It is at once admitted, that by the decisions of this Court, it has been determined that persons who had relinquished lands upon which they resided, or which they cultivated, either themselves or by their tenants, were entitled to the possession of such lands against all third persons, while they remained undisposed of by the United States.

The soundest policy required such a decision; a different one would have encouraged strife and discord throughout the State, and produced innumerable evils. Many hundred thousand acres had been relinquished; in numerous instances, extensive improvements had been made by the first purchaser; and those who regarded their own interest alone, would have used every exertion which art, and often force, could have devised, to obtain the use of such valuable possessions, in the hope that years might revolve before any disposition would be made of them by the government. But moreover, in a trial of this description, it would only be considered who was the person first in possession, and to him, in conformity with all law, would that possession be restored.

JANUARY 1830.

Bell et al.  
v.  
Payne & Wil-  
liams.

---

But although such was the situation of the purchaser who had relinquished the land purchased as regarded third persons, he certainly had no right against, or claim upon the United States. The agreement on the part of the United States to rescind the contract of purchase and sale, was received by him as a privilege granted to him of mere favor, and when this offered bounty was accepted by him, he certainly cannot be heard when he contends for a right in that, all right to which he was bound to relinquish, and did relinquish, before he was entitled to the bounty. As against the United States then, before the grant was made to the State, the complainants or either of them had no right, even of possession; after the land was relinquished, and of course after the grant was made, the grantee stood in the same situation which the grantor occupied before. It is contended, however, that the law giving the right of pre-emption to persons in a particular situation, is unconstitutional, unless those persons had some right in the land to which this preference is given them; and to support this doctrine, the 26th section of the bill of rights is referred to. If this be the case, it is totally unnecessary for the extraordinary remedy which is now asked for to be afforded, because the defendants can receive no right by virtue of an unconstitutional law. But it is believed, that the position assumed by the complainants' counsel, cannot be sustained. This section was never intended to prevent any "privilege, honor or emolument," from being granted by the State; but simply and singly, to prohibit the granting or conferring any "privilege, honor or emolument," and making such grant hereditary. Every day's experience proves, that privileges, honors and emoluments, are often granted and conferred in our State, and in the United States. What is the exemption of certain descriptions of persons from serving on juries, working on roads, &c. but granting a privilege? what is bestowing a brevet appointment in the army, but conferring an honor? and what are the salaries annexed to different offices, but emoluments?

If the complainants had no interest in the land in opposition to the rights of the State, before the passage of the law allowing pre-emptions, did that act vest him with such an interest as gives him a right to the interposition of this Court, to secure him in its enjoyment? This question will be answered, as if the law clearly gave him the preference which the commissioners refused to recognise.

JANUARY 1830.

Bell et al.

v.  
Payne & Wil-  
liams.

The State owns extensive public domains, and wishes to make sale of them. To effect this object, a law is passed, by which persons in particular situations, are authorized to make purchases at fixed prices, in preference to all others. Certainly this is all legal; no person can complain, because the rights of no one is invaded. But the law providing for this mode of sale, also points out certain persons who are to determine whether those who apply to purchase, are within its provisions, and declares that their decision shall be final, and this, it is insisted, could not be done. Why? Because, it is answered, the law vested the right to a preference in the land in the persons coming within the provisions of the statute, and thereby gave them rights which this Court will protect. But the law must certainly be taken altogether. Upon certain conditions, particular privileges are granted to individuals; one of those conditions is, that certain men shall say they are entitled to them. Certainly they have no right to the privilege until this is done. Suppose the law had provided, that the poorest persons in the State should have the preference; that the commissioners should determine who were entitled under this provision; and that their decision should be final. This would certainly have been a benefit gratuitously bestowed, and the poor rejected by the commissioners, could have had no redress in this Court.

I am decidedly of opinion, that the part of the law giving preferences to one person over another, in entering the public lands, is a matter of favor; that the General Assembly had the right to prescribe the terms on which that favor would be granted, and having said that the commissioners, and they alone shall determine on whom the bounty of the State shall be conferred, no person has a right to appeal from their decision. The cases adduced by complainants' counsel, it is believed, do not mitigate against this opinion, as in these cases, private rights were invaded, or at least supposed to be.

I am also of the opinion that the commissioners could revise their proceedings, and re-consider their opinions, at any time before their return was made to the Register, and their first determining in favor of complainants, if their ultimate decision and return to the Register were in favor of the defendants, gave to the complainants no right whatever; and of this opinion is the Court. The motion, therefore, is overruled.

JANUARY 1830.



## TEAGUE V. RUSSELL AND MOORE.

1. No relief can be obtained against usury, in equity, where the party has omitted to plead it at law, and shews no excuse for the failure.
2. To a sealed instrument, an unsealed release is no defence at law.
3. Nor is it in equity, unless founded on valuable consideration.
4. But where a security to a sealed note was discharged by the payee, by an unsealed writing, and induced to believe for several years that he was discharged, and until the principal became insolvent, it amounts to a fraud on his rights, and equity will relieve.
5. Where at law the defence would be doubtful or difficult, equity can take jurisdiction.
6. The assignee of a bond transferred after due, takes it subject to all equitable defences.

JAMES TEAGUE filed his bill in Chancery in Franklin Circuit Court, against J. Russell and W. Moore. The bill charged that on the 17th of February, 1817, the complainant and one Byrd, borrowed of Russell \$400 for twelve months, at ten per cent. interest; that the complainant borrowed \$150, and Byrd \$250; that complainant gave his note under seal for \$165, for the repayment, with Byrd as security, and Byrd gave his for \$275, with the complainant as security; that on the 12th of March, 1818, the complainant paid off his note, and took it up, and Russell gave him a receipt in writing for the money, and in the same instrument expressly released him from liability on the note signed as Byrd's security; that Russell was about to tear off the name of Teague from the note, but on reflection declined so doing, lest it might destroy the validity of the note as to Byrd also, and then gave the written instrument as aforesaid. He charges that Byrd was then well able to pay, and that on the faith of this acquittance, he rested satisfied, and did not attempt to indemnify himself against the consequences of his security-ship, which he might have done, had he not been discharged, as Byrd was for several years afterwards solvent, and in good circumstances. It is further charged, that Russell afterwards assigned the note to Moore, who sued the complainant on it at law, several years after it fell due, notwithstanding the release; which was the first notice he had of the transfer, and of the intention to look to him for it; and that the complainant endeavored to defend the action, but failed, because the release was not under seal, and formed no defence at law. The complainant also charges that he is uncertain if Moore had notice of the release

before the transfer, he believes he had, but that if Russell transferred it to him without disclosing the fact of the release, that he committed a fraud on his rights. It is also charged that Byrd has become entirely insolvent. The prayer of the bill is for a perpetual injunction against the judgment, and for general relief.

The defendants demurred to the bill, and at March term, 1828, the demurrer was sustained, and the bill was dismissed; and this is assigned for error by Teague in this Court.

KELLY & HUTCHISON for the appellant, argued, that the note being under seal, no defence at law could be made; that the release being unsealed, it would not sustain a plea of release, and therefore the complainant should be relieved in equity. That in equity it amounted to a fraud on the rights of Teague, to give him assurances that he would not be looked to, and after a great lapse of time to seek to enforce the demand, when he had no means of securing himself; that he had not neglected his defence, but had attempted to make it available at law, but could not there succeed; and that he was certainly entitled to relief somewhere.<sup>a</sup>

HOPKINS and W. B. MARTIN for the appellees, argued that if any benefit could be derived from the release, it was in a Court of law; and that when the remedy was at law, a demurrer to the bill was proper. But that the pretended release was void in all Courts; that it was made without consideration; that equity would not enforce a mere voluntary defective agreement.<sup>b</sup>

By JUDGE COLLIER. The questions for our decisions, are these:

1. Do the facts disclosed in the plaintiff's bill, interpose a bar to a recovery, by the defendant Moore.
2. Supposing the question to be answered affirmatively, is it competent for equity to administer relief?

These questions are so closely blended, that for the sake of perspicuity, we will consider them together. It is no objection to the recovery of the sum expressed in the bond, that a larger per centum, by way of interest, was reserved, than the law authorized; for it will be observed, that at the time the bond was executed, the reservation of usurious interest did not operate as a forfeiture of the principal;

JANUARY 1830.

Teague  
v.  
Russell &  
Moore.

<sup>a</sup> 4 John's C. R. 22. 5 John's, C. R. 44. 17 John's 384. 10 Johns 587. 19 Johns 129. 14 Johns 330. Minor's Al. R. 118.

<sup>b</sup> 2 Maddox, 170, 171, 288, 385. 6 John's C. R. 87, 4 J. C. R. 497. 2 J. C. R. 557. Pothier on Obligations, 17, 20, 21. Laws of Ala. 491, 493. 1 J. Cases 492. 9 Wheaton.

JANUARY 1830.

Teague  
v.  
Russell &  
Moore.

a Laws of Ala  
1805, p. 442.

b Scott v. Nes  
bit, 2 Bro. C.  
C. 641.

c Minton v.  
Seymour, 4  
John. Ch. R.  
497.

the recovery of the interest alone, was barred by law;<sup>a</sup> and it was not until the statute of 1819 was passed, that usury avoided a contract *in toto*.

Had the plaintiff shewn usury on the trial at law, he could have avoided the payment of interest; but having failed to do so there, and not offering by his bill, any excuse for the omission, the defence cannot be entertained in equity. And even where the usury goes to avoid the contract at law, the omission to plead it, forms no ground for the interference of Chancery, <sup>b</sup> though the lender is placed in a better situation, when the defence is made in equity, than he would be if it were made at law; because usury in the one Court creates a forfeiture of the excessive interest only; in the other, of both principal and interest.

The facts disclosed by the plaintiff's bill, do not constitute a legal release; and had they been proved, would not have sustained a plea of release. It is essential to the validity of that plea, that the discharge relied on, should be under seal, especially where the action is founded on a specialty, according to the common rule, *eodem modo quo oritur, eodem modo dissolvitur*. Understanding it then as confessedly clear, that the acquittance relied on is not a sufficient release at law, it is material to inquire whether equity can perfect it. If it was founded upon a valuable consideration, Chancery, upon the rule that it decrees defective agreements to be consummated, according to the intention of the parties, where the consideration is valid, would give to the plaintiff the benefit of it. But no consideration is alleged; we must therefore suppose that the acquittance was gratuitously made, and consequently cannot give to the plaintiff its benefit.<sup>c</sup>

There is, however, another feature in the cause, which merits consideration. The parol discharge of the plaintiff by Russell, it is alleged in the bill, dissuaded the plaintiff from taking steps to have a collection of Byrd's notes coerced, or from obtaining an indemnity against his liability as surety, which he might have done, had he believed that he would have been resorted to for payment. These facts are admitted by the demurrer. If the plaintiff was induced from the representations of Russell to believe that he would not be called on for the payment of Byrd's note, (and these representations were such as reasonably to induce that belief,) it is a fraud on the plaintiff, now to attempt to force him to pay it. We will not say that a plea, disclos-

ing these facts, would not be sustained at law. That is a point, which to maintain the jurisdiction of this Court, it is unnecessary to consider. If the defence was difficult or doubtful at law, it is compatible with the principles on which Chancery interferes, to administer relief. It is believed, that by the application of this principle, the jurisdiction of equity is sustainable.

The circumstance of the acquittance being by parol, together with the complexity of the fraud, and the proof by which it must necessarily be sustained, would greatly embarrass a defence at law. Again, the variety of decision with regard to the causes for which sureties are discharged, and the tribunals in which they are to be made effectual, render somewhat doubtful a legal defence.

The plaintiff at law became the assignee of the bond after it fell due, and is consequently placed in the same situation as the payee; and any defence which would be available against the latter, may be made against the bond in his hands.

The decree of the Court below is reversed, and the cause remanded, that the defendants may answer the allegations of the bill.

By JUDGE CRENSHAW. In this case, I am of opinion that equity has no jurisdiction, on the ground, that the matter of equity insisted on in the bill, was available in defence to the action at law.

Reversed and remanded.

JUDGE PERRY not sitting.

JANUARY 1839.

Teague  
v.  
Russell and  
Moore.

a Gallatin v.  
Cunningham  
8 Cowen 371,  
per Wood-  
worth, J. 18  
Vesey, 483.

### PLUMMER V. MCKEAN & MCKEAN.

1. It is correct as a general rule, that an obligation to pay a sum of money, which may be discharged by the payment of a lesser sum, is to be considered as a penal obligation, and that the lesser sum only is recoverable, with interest.
2. But where the payment is to be made at a different and distant place, it is otherwise, and the larger amount may be recovered.

THIS was a writ of error sued out by Plummer, to reverse the judgment of the Circuit Court of Franklin coun-



JANUARY 1830.

Plummer  
v.McKean &  
McKean.

ty, rendered on a verdict in his favor, at October term, 1825. He had instituted an action of debt in said Court, against J. C. and J. W. McKean, on an instrument, of which the following is a copy:

"\$2,000. On or before the first day of April next, we promise to pay to James R. Plummer, or order, two thousand dollars, which if paid in par money at New Orleans, may be discharged by sixteen hundred dollars: value received. Witness our hands and seals, September 19th, 1821.

J. C. McKEAN", [L. s.]

JOS. W. McKEAN" [L. s.]

At the trial, the Court, on the motion of the defendants, instructed the jury "that the instrument was a penal bond, and that they could not give a verdict for more than the sum of sixteen hundred dollars, and interest," to which the plaintiff excepted; and this is now assigned for error.

a 3 Atkyns.  
519. 2. H.  
Blackstone,  
519.

HOPKINS, for the plaintiff in error, argued, that by the failure to pay in New Orleans, the defendants became liable to pay the full amount, and that the instructions were erroneous.<sup>a</sup>

COALTER, for the defendants.

By JUDGE CRENSHAW. The question to be settled, is, whether the \$2,000 is penalty, or whether it is the debt actually due? I lay it down as a correct general rule, that where a greater sum is to be discharged by the payment of a less, without reference to the place of payment, or other circumstances which would form an exception to the general rule, the greater sum will be considered as penalty, and the less as the debt actually due.

b Page 520.

But the case under consideration forms an exception to the rule. From the peculiar phraseology of the contract, the distance of the place where the money was to be paid, the difference of exchange, and the advantage of prompt payment to the obligee, I infer that the \$2,000 was the debt actually due, and not penalty. The case in 3d Atkyn's Reports,<sup>b</sup> which was a mortgage at 4½ per cent. with a proviso, that if the interest be paid semi-annually, the mortgagee will accept of 4 per cent. illustrates the principle now contended for. Chancellor Hardwick decided, that if the 4 per cent was not paid, the mortgagee might recover the 4½ per cent. and that the greater interest was

not penalty. So in the case at bar, though the debt of two thousand dollars might have been discharged, by the prompt payment of \$1600 at New Orleans, yet it is not to be taken as *nomine pænæ*. The Court are of opinion that the judgment of the Circuit Court must be reversed, and the cause remanded.

JANUARY 1830.

Plummer

v.

McKean &  
McKean.

By JUDGE SAFFOLD. It was clearly expressed, that \$1600, if paid in New Orleans, should discharge the debt. The stipulation that the payment should be in "par money," was not different from the legal obligation to pay other debts. If \$2,000 is to be considered as the true debt, it could no where be discharged in any thing inferior to notes at their current rate of exchange. The payment could only have been made in specie, or other medium which the creditor was willing to receive as its equivalent. An agreement to pay a particular sum of money, subject to be discharged by a less sum, if punctually paid, is substantially the same as a contract to pay the smaller sum, and in default thereof, that the larger amount shall be the sum due. The difference is only in the phraseology, for the legal effect of the contract in either form, is precisely the same. In all such contracts, the larger sum is in law regarded as penalty; and I conceive such to be the doctrine of a variety of former decisions by this and other Courts. Then can the fact, that the less sum contracted to be received in discharge of the debt, was to be paid at a particular place, vary the principle? If so, there could be no difficulty in shaping contracts accordingly, and evading the legal objection to the recovery of penal stipulations.

I conceive that this question ought to be determined, like all others of a kindred nature, with a view to the difference in the sums, and the reasonableness of the higher responsibility, compared with the injury or inconvenience to be incurred by the failure to comply. Can it be supposed, that the parties to this contract estimated as a real difference, four hundred dollars in the value of this debt, for the sake of having the payment made in Orleans? I presume not; as one tenth of that sum would have been an adequate premium for the expense and risk of the remittance.

The case of *Nichols v. Maynard*,<sup>a</sup> which is mainly relied on by the plaintiff in error, was a case in which money had been lent on interest, at four and a half per cent. and secured by mortgage. But there was a verbal agreement, that if the mortgagor paid the interest for every half

<sup>a</sup> 2 Atk. 519.

JANUARY 1839.

Plummer  
v.  
McKean &  
McKean.

year, before the third quarter became due, the mortgagee would abate a half per cent. The interest not having been thus promptly paid, the question was, whether four or four and a half per cent was due? The four and a half per cent was allowed by the Chancellor. In that case, however, the difference of the premiums was only a half per cent, and both within the legal rate of interest; and the less sum was agreed to be taken as a discharge, only on condition that the same was paid earlier than the maturity of the higher rate. I consider it a general and almost invariable rule, that the least sum, which by the terms of the contract will discharge a debt on the day appointed for payment, is to be regarded as the true debt. Suppose the \$1,600 in this case to have been the true debt, and that the defence had been usury; doubtless the defence must have prevailed, unless defeated by the stipulation that payment of the amount of the true debt should be received as a satisfaction. I conceive that this would have been the correct legal view of the subject, and that in any form in which the question can be presented, the additional sum of four hundred dollars ought to be treated as *nomine pænæ*. I therefore dissent from the opinion of the majority.

Reversed and remanded.

#### JORDAN V. LEWIS.

1. A note for a sum certain, payable at a future day, which may be discharged by the payment of a lesser sum at an earlier day, is valid, and the larger sum is not penalty.
2. Nor is such note upon its face usurious.

THIS was an appeal from the decision of a justice of the peace of Pickens county, in a suit in which Moses Lewis was plaintiff, and W. Jordan, defendant. The action was on a note, as follows:

"Springfield, July 30, 1825. On or before the 25th December, 1829, I promise to pay Moses Lewis, or bearer, forty-one dollars and twenty-five cents, for value received. If paid October 1st, thirty-three dollars is to satisfy this note.

WILLIAM JORDAN."

Judgment by default was given for the plaintiff at the April term, 1928, of Pickens Circuit Court, for \$42 25, and interest, &c.

JANUARY 1930

Jordan

v.

Lewis.

Jordan, in this Court, assigns for error, that the judgment should have been for \$33 only, and interest, and that all over that amount was penalty and not recoverable.

ROSE, for the plaintiff in error, cited the case of *Henry & Winston v. Thompson*, Minor's Alabama Reports, 209, and submitted the cause.

R. K. ANDERSON, for the defendant.

By JUDGE CRENSHAW. In support of the assignment of error, the case of *Henry & Winston v. Thompson*,<sup>a</sup> is relied on in the brief. The several cases of a kindred class, decided at the same time with the one cited, were on four several descriptions of notes; 1st. To pay the principal at a future day, and if not punctually paid, then to pay interest at the rate expressed; 2d. To pay the principal at a future day, with interest at the rate expressed from the date; 3d. To pay the principal at a future day, with the interest expressed, without stating the time from which or to which it was to run; 4th. To pay the principal at a future day, with interest from the maturity of the note. Also in the cases of *Dinsmoor v. Hand*,<sup>b</sup> and of *Fragua & Hewit v. Carriel & Martin*,<sup>c</sup> the contracts were for the payment of money at a future day, and if not punctually paid, to bear interest from the date. But the note in the case under consideration, does not fall within any of these descriptions, and consequently is not settled by the principle of decision recognized in those cases. To pay a sum of money at a day certain, but which may be discharged by the payment of a less sum at a previous day, has no similitude to any of the cases enumerated. The case at bar, then, is clearly distinguishable from all these cases. The substance of the contract is to pay \$41 25 cents, at a future day, but if paid nearly three months before the day, the payee will accept of \$33 in lieu of his debt. This was a benefit to both parties, and therefore not penalty; a benefit to the payee to receive his money before it was due, and a benefit to the payor in discharging the debt by the payment of a less sum.

<sup>a</sup> Minor's Ala. Rep. 209.

<sup>b</sup> Minor's Ala. Rep. 126.  
<sup>c</sup> Ib. page 170.

It has been determined in this Court by many adjudications, and is now conceded, that where, by the terms of the

JANUARY 1830.

Jordan  
v.  
Lewis.

contract, the payment of a less sum is intended to be secured by the payment of a greater sum, the less sum will be considered as the debt, and the greater as penalty; but this is on the supposition, that both are payable at the same time, or at least that the less is not payable before the greater becomes due.

For the same reasons that we cannot infer, from the face of the contract, that the \$41 25 is not penalty, we also infer that it is not usury. Usury is a corrupt agreement to receive more than 8 per cent. for the loan or forbearance for one year; but in the present case, the agreement is not to receive more, but less than the legal rate of interest, if the debt be paid a considerable time before it becomes due.

For these reasons, a majority of the Court are for affirming the judgment of the Circuit Court.

By JUDGE SAFFOLD. I am constrained to dissent from the opinion of a majority of the Court, as expressed in this case; Most of the reasons I gave in my dissenting opinion, filed in the case of *Plummer v. McKean & McKean*, during the present term, are the same by which I

• Ante p. 423.

am now governed.\*

The contract was to pay a certain sum on a given day, which might be discharged by the payment of about four fifths of the amount a few months earlier. The interest that could accrue between the different periods appointed for the payment on either sum, could not exceed one eighth of the difference in amount. The principle sustained by a majority is, that immediately on the failure to pay the less sum on the earliest day, the larger sum became the true debt, and was absolutely recoverable after the last day appointed for the payment.

The obligation for the greater sum was evidently a penal stipulation, to secure the earlier payment of the less sum. If the recovery is sustainable for the larger amount in this case, the same principle would sanction the recovery of any sum under a contract, to pay so much twelve months after date, which might be discharged by half the sum in six months. I conceive it utterly impossible to distinguish the cases, either in principle, or on authority; and that the doctrine of this decision entirely removes all restraint against the collection of penalties or usury.

Judgment affirmed.

JUDGES TAYLOR and PERRY also dissenting.

## ROCHON V. LECATT.

1. An agreement made before marriage between husband and wife, by which the husband relinquishes all right to the property of the wife, and agreed she should retain it to her own separate use, does not, in equity, bar the husband's right of curtesy.
2. Nor does a decree of divorce *a mensa et thoro*, pronounced against him, bar such right.
3. Nor an injunction granted in the lifetime of the wife, on her prayer, prohibiting the husband from intermeddling with her property.
4. The rule of construction on such an agreement is the same in equity as at law.

In August, 1829, Nannette Rochon filed a bill in Chancery in the Mobile Circuit Court, against Littleton Lecatt, praying relief against a judgment at law which Lecatt had obtained against her, and in which he had recovered possession of a lot of ground in Mobile, and damages.

She charged in her bill, that in 1818, Mrs Anne Lecatt sold and conveyed the lot to one J. Champenois; that Champenois conveyed to one Dameron; he to McLoskey, and McLoskey to her; that Mrs Lecatt was formerly the widow of one Thomas Surtill, and that in 1813, she intermarried with L. Lecatt; that previously to her marriage, she and Mr Lecatt entered into and executed a marriage contract, which is in these words:

"Articles of agreement indented, made, &c. between Littleton Lecatt, sailing master in the United States' Navy, of the one part, and Anne Surtill, widow of the late Thomas Surtill, of the other part, as follows: whereas a marriage is shortly intended to be had and solemnised between the said Lecatt and Anne Surtill. It is therefore covenanted and agreed by and between the said parties to these presents, in manner and form following, that is to say: that the said Littleton Lecatt, by these presents, renounces all claim, right, title, or interest, to any part or parts of the estate of the late Thomas Surtill, in right of the said Anne Surtill, his intended wife; she to retain the said property of what nature soever, for her own use and benefit. In witness whereof, we have hereunto set our hands and seals, in the presence of subscribing witnesses, at the town of Mobile, Mobile county, Mississippi Territory, this 19th July, 1813.

(Signed) "LITTLETON LECATT, [L. s.]  
"ANNE LECATT, [L. s.]

"Attested by C. S. Stewart and W. R. Dodge, as witnesses, and Zeno Orso, Notary Public."

JANUARY 1828.

Rochon  
v.  
Lecatt.

---

The bill further charges, that after the marriage, the parties lived a short time together unharmoniously, and that in February, 1814, in consequence of domestic differences between them, they mutually filed bills in Chancery against each other in the Superior Court of Mobile county. Mrs Lecatt prayed for a separation from bed and board, and an injunction to restrain the husband from meddling or interfering with the property intended to be secured by the agreement; and Mr Lecatt, in his bill, prayed that the agreement might be cancelled, and that his wife should be enjoined from managing or intermeddling with the property. In June, 1814, a decision was made in said causes by Judge Toulmin, then presiding, who decreed a divorce from bed and board between the parties, and a perpetual injunction against Littleton Lecatt; and dismissed the bill filed by him, and dissolved the injunction which had been obtained by him against his wife. It is further alleged, that Littleton Lecatt, in obedience to the decree, ceased to intermeddle with the estate, and separated himself from his wife Anne, and left the State, but returned after the death of his wife, and though he never in her lifetime, after the decree, set up any claim to her property, yet that he has, notwithstanding the marriage contract, claimed the right of curtesy in her lands, and under that claim, recovered against the complainant, by a judgment at common law, the lot and \$612 damages; that she, and she believes also those under whom she claimed, were entirely ignorant of any such right existing in him. All which proceedings, she alleges are contrary to equity, &c. wherefore she prays an injunction to restrain the defendant from enforcing his recovery at law against her.

The defendant, Lecatt, filed his answer, not controverting any of the facts, but resting his right on the construction given to the contract in the Court of law, and which was sustained in the Supreme Court, as being no bar to his right of curtesy.

According to an agreement between the parties, the facts of the bill stood as admitted; and at October term, 1828, a decree was rendered in the Circuit Court by consent, *pro forma*, dismissing the complainant's bill; from which she took an appeal to this Court, and now here assigns that decree as error.

ACRE, for the appellant. To sustain our right to relief on our bill, we rely on three propositions, which we believe are sustainable:

1. The contract was fairly entered into between the parties, for a valuable consideration, (marriage,) and it is clear and explicit in its terms. FEBRUARY 1830

Roches.  
v.  
Lecant.

2. A contract founded on such a consideration, ought to be enforced by the tribunal having the power to do so, whenever either of the contracting parties refuses to comply, and a compliance is demanded by the opposite party.

3. That all persons claiming under either of the parties, have a right to a specific performance of the contract, to the extent of the right or interest claimed by him.

If the contract was fairly made, which is admitted, ought not the intention of the parties to be carried into effect, when that intention is manifest from the terms of the contract? In the case of *The Methodist Church v. Jacques*,<sup>a</sup> the terms of the contract were not expressed in stronger language than in this case; yet the intention was there carried into effect. The object of the contract, says the Court, was to protect her against the debts, control, or interference of the husband, and the intention is too manifest to be mistaken; a Court of equity will certainly protect the wife in the enjoyment of the property according to the settlement. The doctrine runs through all the cases, that the *intention* of the settlement is to govern, and that it must be collected from the terms of the instrument. <sup>b</sup>

<sup>a</sup> 3 John. Ch.  
R. 82.

<sup>b</sup> 3 John. Ch.  
R. 114. 3  
Dess. 417.

Marriage settlements are made to secure the wife and her offspring a certain support in every event; <sup>c</sup> but if the husband can, contrary to his agreement, become tenant by the curtesy, and thus defeat the object of the contract, by retaining the estate from the heirs, or by recovering it from a *bona fide* purchaser, how can her offspring, and especially her children by a former marriage, expect to obtain a *certain support*, which it was the intention of the contract to secure to them? <sup>d</sup>

<sup>c</sup> 3 John. Ch.  
R. 87.

<sup>d</sup> 3 John. Ch.  
R. 539, 540.

Marriage is a good and valuable consideration; it is the foundation of this contract; and it is a general rule, that equity will execute marriage articles at the instance of all persons who are within the influence of the marriage consideration. <sup>e</sup> Are not purchasers from the wife, under such articles, within the influence of such marriage consideration. They certainly are, and the articles should be specifically enforced upon the prayer of such persons, to the extent of the right transferred by the purchase. They are the assignees of the wife, of a right which she, by the articles, had reserved the power to dispose of, and they stand in her place so far as regards the amount of interest assign-

<sup>e</sup> 3 John. Ch.  
R. 550. 2 K.  
Comm. 144,  
138.



JANUARY 1860.

Rochon  
v  
Lecatt

3 John. Ch.  
R. 87.

3 John. Ch.  
R. 457-8-9. 2  
Kent. Com.  
136. 2 Peere,  
Wms. 318,  
319.

3 Atk. 503.

3 John. Ch.  
R. 114. 3  
Dess. 417.

ed, and consequently are entitled to the same interference of equity that she would be, if she had never sold her right. If a Court of equity would "protect the wife in the enjoyment of her property according to the settlement,"<sup>a</sup> surely it will not refuse the prayer of her legal representative, who occupies her place. The non-intervention of trustees is no objection to the carrying of the contract into effect; for it has been expressly decided that it is not now necessary that the legal estate should be vested in an indifferent person as trustee, in order that it may be carried into full and complete effect,<sup>b</sup> and technical words are not necessary to create a separate estate, or trust;<sup>c</sup> but the intention of the parties is to govern, and must be collected from the terms of the instrument.<sup>d</sup> Then if the intention of the parties to the contract is to govern, and if the intention is clear and plain as we have supposed, the only question which remains to be determined, is, whether a married woman, under a contract securing to her a separate estate, can sell and dispose of it without the concurrence of her husband.

A married woman acting with respect to her separate property, is, in all respects, competent to act as if she were sole. She may give, pledge or sell it; or make any other bargain with respect to it, with any person, in the same manner as if she were sole. In equity, she is considered as a feme sole, in regard to and to the extent of her separate estate, and the *jus disponendi* follows as a matter of course.<sup>e</sup> So entirely is the unity of person disregarded in equity, that she may even sell her separate property to her husband, and purchase property of him.<sup>f</sup>

If a woman living with her husband, and under his presumed influence, is thus favorably looked upon in equity, and is there so entirely considered as a distinct and separate person, that she may buy from or sell to her husband, much more should she in the same Court be considered as a feme sole, and beyond the control of her husband, in regard to her separate property, when she is separated from him by a judicial sentence, and has no protection but her own good conduct, and can hope for no support but from her own industry, management and good bargains.<sup>g</sup> Such was the case with Mrs Lecatt, when our purchase from her was made, and our right under her accrued.

The whole argument of the appellee, in opposition to our bill, seems to rest on the belief, that the question has already been decided by the Court of law. This idea is fal-

<sup>a</sup> Clancy on Rights of married women, 347. 3 Dess. 443, 447, 456, 459, 439. 11 Ves. Jr. 209 to 237 13 Vesey, Jr. 189. 1 Fontblanque, 96 to 100. 2 K. 136. Sec. 4. Newland on Contracts 25 17 John. 548.

<sup>f</sup> Clancy on Rights of married women, 351, 355. 2 Kent. 139.

<sup>g</sup> 2 Kent. 132, 136.

JANUARY 1880

Rochon  
v.  
Lecatt.

---

lacious: a Court of law never decides a question which is peculiarly appropriate to a Court of equity, but decides such questions only as belong to its own jurisdiction. For instance, if a man intending to convey real estate, make a deed without affixing a seal to it, he is not, in law, concluded by what he has done, and a Court of law will not undertake to supply the defect, but will permit him, though he is the vender, and though he have received the consideration, to recover from the vendee the very same estate he had sold; but a Court of equity, looking to the intention of the parties, and not to the form of the instrument will injoin the vendor from doing what in good morals he ought not to do, and decree a specific performance of what the parties, at the time of making the contract, intended.

We are asked if Lecatt can be supposed to have surrendered a right not in existence at the time of his renunciation, that is, his tenancy by the curtesy. This interrogatory may be answered by asking another question: cannot a man oblige himself not to take a right which the law would give him, or which might, by the operation of peculiar circumstances, happen to accrue; and has he not done so? Whatever might be the result at law, he certainly did, in equity, "renounce all claim, right, title, or interest to the estate of his intended wife, which the intended marriage would give him." This contract, in the words just cited, cannot be considered as a renunciation of any right he might have had previous to the marriage, for it is not contended that he had any right before that event. What then was the contract intended to act upon? Rights afterwards to be acquired by the act, the benefits of which were relinquished. A sensible construction must be given to the contract, *ut magis valeat, quam pereat*. It must, therefore, have been such rights as the intended marriage would give him, that he renounced by the contract in question. The tenancy by the curtesy was a right incidental to the marriage, and surely, as well as all other marital rights, was renounced by the contract; "all claim, right, &c. to the estate of the intended wife is relinquished; is not the curtesy a right springing from the intended wife? If so, is it not renounced? How then, can the appellee "claim" a "right" to it in equity, in the face of his agreement. The Court is now asked to carry into effect the intention of the parties, regardless of the form in which they

JANUARY 1830.

Rochon  
v.  
Lecatt.

have expressed it. This prayer is peculiarly of equity cognizance, and not of that of a Court of common law, and therefore, cannot have been decided by that tribunal as supposed; the question is therefore, still open.

It is said that the rights of the parties depend on the construction of the marriage contract. In this idea we most cordially unite. What then is the meaning of the parties, and what construction ought to be put on the contract by which they intended to express their meaning, and to be understood?

We cannot conceive that the contract in question admits of any construction but this; that Mrs Lecatt reserved to herself, by that contract, the entire control of her own property, in the same manner as if she were to remain single; and that Lecatt renounced "all claim, right, title and interest" thereto, which the intended marriage would give him by law.

If he *intended* to renounce such rights as the law might give, how could he be tenant by the curtesy, in the contemplation of that tribunal which carries the *intention* of the parties into specific execution? <sup>a</sup> He might have been so at law, but if he were, he was so, just in the same manner that a man still remains at law the legal owner of real estate which he intended to convey, and thought he had conveyed, by making a deed of conveyance to which he had neglected to affix his seal. Equity would there declare him a trustee for the purchaser, and if, taking advantage of his legal rights, he had refused to do what was right, would compel him to do what he had agreed to do, and for the evidence of that agreement, that Court would look to the instrument he had signed. All we ask, is, that the Court should do so in this case.

<sup>a</sup> 3 John. Ch.  
R. 539. 2 P.  
Wms. 318,  
319.

<sup>b</sup> See the arg.  
and authori-  
ties in the  
case of  
Smoot and  
Nicholson v.  
Lecatt, and  
Rochon v.  
Lecatt. 1  
Stew. Rep.  
pages 590,  
603.

SALLE and KELLY, for the appellee, argued that neither the agreement, the injunction, nor the decree of divorce formed any bar to the appellee's right of curtesy.<sup>b</sup> They further insisted that the construction to be given to the articles of agreement, must be the same in equity as at law, and that its construction and legal effect having been determined on solemn argument in this Court, between the same parties, that the decision was obligatory and binding, and could not be departed from. They referred to the case reported in Talbot, where the question came up a second time, whether a widow could be endow- ed out of an equitable estate, in which Lord Thurlow observed with much regret that the law had been settled

otherwise, that Courts could not depart from their former decisions, and that it required an act of parliament to change a rule of law. The case of *Benson v. Wilbey*,<sup>a</sup> was also cited, in which Twisden says, the Court cannot recede from prior resolutions and decisions. Blackstone says,<sup>b</sup> it is an established rule to abide by former precedents when the same points come again in litigation, as well to keep the scale of justice steady, and not liable to waiver with every new Judge's opinion, as also because the law in that case being solemnly declared and determined, what was before uncertain and indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter or vary from according to his private sentiments. Judges often declare that if the question of law were *res integra*, they could decide otherwise; but consider themselves bound by the prior decisions. They referred to the voluminous notes of Christian, Chitty and Thomas, on the above law, as laid down by the commentator, also to Pothier, on the subject of *res judicata*; and to the remarks of Kent,<sup>c</sup> Burr,<sup>d</sup> Van Buren,<sup>e</sup> and Senator Cramer,<sup>f</sup> on the same subject. They insisted that in the absence of any authority, it must be manifest that such must be the rule; for when the Supreme Court had declared the law, that it became the law of the case, for there was no superior authority to decide otherwise; that there was a want of power in this Court in the same cause to decide differently; and that the consequences upon society if the rule were not so, would be injurious in the extreme.

JANUARY 1839.

Rochon  
v.  
Lecatt.

<sup>a</sup> 2 Sam. 155.<sup>b</sup> 1 Black's  
Comm. 46.<sup>c</sup> 1 Kent's  
Com. 442.<sup>d</sup> 2 Cowen,  
340.<sup>e</sup> Ib. 340, 360,  
361, 369.<sup>f</sup> Pages 394-5.

By JUDGE SAFFOLD. The bill prays a specific performance of the *ante nuptial* contract, as far as the appellant is interested, and for relief against the operation of the judgment at law which the appellee has obtained against her. The answer does not deny any of the material facts charged, but rests the defence on the legal and equitable validity of the appellees title, and the confirmation it has received from the judgment at law rendered in his favor, in the suit between the same parties, and which has been recently affirmed in this Court.

That the estate was an inheritance of which the wife was seized; that the marriage actually took place; that there was issue of the marriage capable of inheriting; and that the wife had died previous to the institution of either suit; are facts which are not understood to be con-

JANUARY 1830.

Rochon  
v.  
Locatt.

tested in this suit, but on the contrary, they are admitted. Nor is it understood to have been contended in favor of the appellant, that the Chancery proceedings in favor of Locatt and his wife, (which are admitted to be correctly set out in the record,) can have any material influence on the question, except so far as the divorce *a mensa et thoro*, can contribute validity to the conveyance subsequently made by the wife, or so far as it may tend to impair the right to curtesy, claimed by the husband. But the appellant relies for a recovery on the following positions: 1. That the marriage articles were fairly entered into for a valuable consideration, (marriage,) and that their terms are plain and explicit; 2. That Chancery, if not law, is competent, in case of failure to comply, to enforce such a contract, when sought by the party aggrieved; 3. That all persons claiming under either of the contracting parties, have a right to a specific performance of the contract, to the extent of the right or interest claimed.

Hence the entire controversy resolves itself into the question, what is now the legitimate effect of the ante nuptial contract. If the judicial determination which has been had was legal, or if it has a binding influence at present, it is conclusive of the right, unless it is the province of Chancery, subsequent to the decision at law, to arrest the recovery, and establish it on other and contrary principles. It appears from the views taken of the case in the former decision, and the authorities on which it was founded, that this Court was then of opinion that the right to the curtesy was sustainable, as well on the principles of equity as of law. It is true the opinion expressed more confidence as to the legal right, but it rested the decision mainly on Chancery authority.

\* 1 Atk. 606.

† Clancy on  
Rights of  
married wo-  
men, p. 193.

In that decision, the case of *Roberts v. Diswell*,<sup>a</sup> decided by Lord Hardwicke, was one of the authorities relied on. This subject, embracing the opinions of the same Chancellor, has recently been reviewed by Clancy, in his late treatise,<sup>b</sup> and whose authority is now referred to by the appellant. He says, (adopting the idea of Lord Hardwicke,) "if a trust estate is not such a one as is sufficient to bar the husband of his tenancy by the curtesy, the next question will be, whether a devise to the wife for her separate use, will bar him? I am of opinion it will not," for the reason, that there is a sufficient seisin in the wife. He also refers to a subsequent decision of the same Chancellor, in *Hearle v. Greenbank*,<sup>c</sup> in which the contrary

\* 3 Atk. 695.

JANUARY 1830.

Rochon  
v.  
Lecatt.

doctrine was held, "that where the profits had been given to the separate use of the wife, she was thereby made a *feme sole*; that the husband could have no legal seisin during the coverture; could neither come at the possession, nor the profits; nor could he have an equitable seisin, for that would be directly contrary to the father's intention; and neither in law nor in equity was the husband tenant by the curtesy." Thus it appears, as remarked by Claney, "that his lordship in one case, considered the receipt by the wife of the rents, to her separate use, a sufficient seisin, to entitle the husband to curtesy; and in the other, that it was not a difference incapable of being reconciled; but that it had lately been decided, in conformity to Lord Hardwicke's first opinion, that a trust of an estate to a married woman for her separate use, does not prevent the husband's tenancy by the curtesy; that this decision was pronounced by the vice Chancellor, Sir John Leach, in *Morgan v. Morgan*,<sup>a</sup> where, previous to marriage, part of the estate of the wife was conveyed to trustees in trust for the separate use of the wife, for life, with power to her to appoint the fee, by deed or will, and for want of appointment, in trust for her, heir heirs and assigns.

a 5 Mod. 408.

The decisions above referred to, being urged in favor of the heir of the wife, after her death, in opposition to the right of curtesy, the vice Chancellor said "that as the two conflicting opinions of Lord Hardwicke could not be reconciled, recourse must be had to principle and analogy; that, as at law, where the wife, during coverture, is seised of an estate of inheritance, the husband, having had issue by her capable of inheriting the estate, is entitled to the curtesy; so where the wife is seised of an equitable estate of inheritance, and has issue capable of inheriting it, the husband is equally entitled to the curtesy; that in this case she had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life; that by the receipt of the rents, she was seised of the estate, and having issue capable of inheriting, the husband must be entitled to the curtesy."

The settlement in the case of *Morgan v. Morgan*, appears to have been more effectual and absolute than in the case at bar. There the conveyance was to trustees, in trust, for the separate use for the wife, for life, with power to her to appoint the fee by deed or will, and for want of appointment, in trust for her, her heirs and assigns; from which it might plausibly have been contended, the inten-

JANUARY 1830.

Rochon  
v.  
Lecatt.

\* Meth. Epis.  
Church vs.  
Jaques, 3  
John. Ch. R.  
97.

§ 7 John. Ch.  
R. 229.

tion was to place all the interest in the estate entirely beyond the husband's reach or control, at any time and in any possible event. Such, however, under the policy of the law, favorable to the *jus mariti*, was not the judicial interpretation of the instrument.

The case mainly relied upon, in opposition to the right of curtesy, <sup>a</sup> is by no means decisive of the doctrine attempted to be sustained by it. It involved no question respecting the right to curtesy. That was a contest concerning the rents and profits during coverture. The contract was ante nuptial, and with a trustee for the intended wife, by which the husband agreed not to intermeddle with, or have any right, title, or interest, either at law or in equity, to any part of the rents, issues, and profits, or proceeds of the wife's property, real or personal; but it was, by the conveyance, to continue to remain and be to her, and it was provided that "after marriage, she should be permitted to hold and enjoy the same, and receive and take the rents, issues and profits, &c. to the end that the same should not be subject to the control, debts, intermeddling, or engagements of her husband, but should be to her only use, benefit and disposal." The wife's right to the rents, issues and profits, was protected, but nothing was expressed in the decision, from which an inference can be drawn that the husband would not have been entitled to curtesy, if the other legal requisites to such an estate had occurred. The same remark may be applied to the case of *Stewart v. Stewart*,<sup>b</sup> which was also supposed to have a material bearing on the question; nor can the divorce *a mensa et thoro* have the effect to bar the curtesy. This decision is not intended to convey any intimation of the opinion of the Court respecting either the legal or equitable interest of the appellant, after the death of Lecatt. The right to the curtesy only is now in question; and so far as this question is concerned, the Court feel no dissatisfaction with the principles of the former decision, and think them decisive of this controversy, as well in equity as at law, consequently that the decree of the Circuit Court must be affirmed.

By JUDGE CRENSHAW. When the case of *Lecatt v. Smoot & Nicholson*, was determined at a former term of this Court, I expressed what I conceived to be a sound interpretation of this ante nuptial contract, executed by Lecatt, previous to his intermarriage with Ann Sertill. The subject is doubtless one of deep interest to the parties

JANUARY 1830.

Hochon  
v.  
Lecatt.

---

concerned, and with me this was an additional inducement to re-examine, and maturely deliberate again on that part of my opinion which relates to the question before us. In the opinion which I then pronounced, I endeavored to shew, that by the terms of the instrument, Lecatt did "re-nounce all claim, right, title, or interest, to any part of the estate of Thomas Surtill," which he might acquire by virtue of the intended marriage; that his relinquishment extended to any right or claim in that estate which might accrue to him at the death of his wife, so as to bar his right to the curtesy; that this, like all other instruments of writing, should be construed according to the obvious meaning and intention of the parties; that it being conceded on all hands, that the contract did deprive Lecatt of all right to the use and enjoyment of the estate during the life of his wife, that from the generality of the terms used in the contract, it must equally extend to a renunciation of any right in that estate, which might result to him on her death; that his right to the curtesy after her death, was as much by virtue of the intermarriage, as was his right to the use and enjoyment of the estate during her life; that more emphatic language could not have been used, to bar Lecatt of all right, in the estate which might be acquired by the intermarriage, unless the right to curtesy in so many words had been expressed; and that I deemed it unnecessary to resort to any rules of construction, because the meaning and intention of the parties were, to my mind, apparent beyond a doubt. I further insisted that if the contract created a trust estate, it was not void for want of a trustee; and that such a contract depriving Lecatt of his right to the curtesy, could be successfully used in resistance to an action at law, brought to recover his curtesy. But that the instrument in question, as I conceived, bore no resemblance to a deed of trust; nor did it create a trust estate, but was a mere renunciation of a future interest, and which during the life of Lecatt, was intended to leave the estate where he found it, previous to his intermarriage. This was the light in which I then viewed this contract, and which I considered to be its fair and legal interpretation; and now after again hearing a full argument, and taking a closer examination of the authorities, the conviction of my mind is still the same. I am still of opinion, that by the marriage contract, Lecatt did clearly relinquish his right to the curtesy. Independent of any rules of reason, I am inclined to believe that I am well sustained in my conclusions by



JANUARY 1830.

*Rechoy*  
v.  
*Lecatt.*

the authorities referred to, and which have been read and explained by the counsel for the appellant. But though this was then, and still is my opinion, on the construction of the marriage contract, yet a majority of the Court in that adjudication determined otherwise; and decided that this contract afforded no bar to Lecatt's right to recover.

It then becomes important to inquire, whether this Court is now bound by an interpretation which they gave to the same contract, though between different parties, in a case on the law side of this Court, though in the present case we sit as a Court of equity.

That the rules of construing a contract are the same in both Courts, though the mode of proceeding and administering relief be different, is a proposition too plain to admit of debate. If a Court of law having competent jurisdiction, interpret a given contract, and decide that it does not take away the right to curtesy, a Court of equity is concluded by such decision on the same matter, and between the same parties; but generally it is otherwise when the suit is between different parties. But where the Judges to-day sitting as a Court of law, undertake to interpret a contract, and to decide on rights growing out of that contract; to-morrow, the same Judges sitting as a Court of equity, though in a case between different parties, ought to be governed by the principles of their first interpretation and decision, unless they believe it was manifestly wrong. If, in the case of *Lecatt v. Smoot & Nicholson*, a majority of the Court were of opinion that Lecatt's right to the curtesy could not be defeated by the marriage contract, it would at least argue much inconsistency for them now to act in direct opposition to their former opinion, and give a new construction to the same contract; though they sit as Chancellors, and the case is between different parties.

For the reason alone, therefore, that a majority of the Court are not ready as yet, to recede from their former construction and opinion, I do not dissent from the judgment now pronounced by the Court.

By JUDGE COLLIER. Believing the opinion of the Court in this case to be at variance with correct legal rule, with entire respect, I feel it due to myself to express the reason why I have yielded to it my acquiescence. The reason is briefly this: this Court, at July term, 1828, in a case at law between these parties, in which the same subject matter was in controversy, held that the ante nuptial

agreement did not divest the right of the appellee to the curtesy. It is true, that, according to the view taken by the Court, that case might have been determined in favor of the appellee, without interpreting the legal effect of the agreement; but the record fairly presented the question of exposition, and as the powers of a Court of law, after the death of the wife, were as adequate to its adjudication as those of a Court of Chancery, I am therefore denied the right to declare the result of my judgment.

The principle of the opinion of the Court, according to my conception, is this: that the husband cannot be divested of his curtesy, by an agreement entered into with his wife previous to, and in contemplation of their marriage, unless that agreement renounces it *in totidem verbis*. If there be any authority savouring of this notion, it has eluded my researches, and doubtless those of the counsel for the appellee. The authorities by which the opinion of the Court is attempted to be sustained, when examined, will, I apprehend, be found to lend it no assistance. The case of *Tabb v. Archer*, if it can be used in this case for any purpose, will, when examined *entirely*, be found to be an authority adverse to the positions which it is quoted as evidencing.

If the ante nuptial agreement was presented to a conveyancer as a memoranda, from which to draft a marriage settlement, would he not so draw it as that the husband's right to the curtesy would be relinquished, according to the rules of law as heretofore ascertained? Most certainly he would. What else can be meant by these words: "That the said Littleton Lecatt, by these presents, renounces all claim, right, title, or interest to any part or or parts of the estate, of the late Thomas Surtill, in right of the said Anne Surtill, his intended wife," than a renunciation of all "claim, right, title, or interest," which the appellee might acquire, immediately on his marriage with "Anne Surtill," or on any contingency. This is a question to which it seems there can be but one answer.

I will not pursue the subject any farther, as I am denied the privilege of dissenting, but will remark, that whenever an analogous case shall come before this Court, I will treat it as *res integra*, in its adjudication.

Decree affirmed.

JANUARY 1830

Rochon  
v.  
Lecatt.

JANUARY 1880.

## FARRAR V. FOOTE

A defendant in a magistrate's Court obtained a certiorari to remove the case into the County Court, and filed the petition, *fiat* and bond. The papers were handed in by the justice, but no writ of certiorari had issued. After declaration, on motion of the plaintiff, the suit was dismissed, because there was no writ of certiorari. Held, that this was error, and that a certiorari should issue if required by the defendant, on his motion.

THIS was a writ of error from the County Court of Perry county. S. Foote recovered a judgment against G. Farrar, before a justice of the peace; Farrar petitioned the Judge of the County Court for a certiorari, to remove the cause into that Court, which the Judge granted, and by his *fiat* directed writs of certiorari and supersedeas to issue. The petition and *fiat* were filed with the clerk, and also a bond as required by the order. No writ of certiorari was ever issued; but the magistrate delivered the papers of the cause to the Clerk of the Court, with his certificate of their verity. At the first term, Foote appeared, and filed his declaration; and also moved to dismiss the proceedings from the County Court, because no writ of certiorari had been issued. This, the defendant, Farrar, resisted, and moved the Court for a second order for a certiorari. The Court granted the motion of the plaintiff, and dismissed the suit at the defendants costs. Farrar, the defendant, excepted, and now here assigns this for error.

GOODE, for the plaintiff in error.

A. G. PERRY, for the defendant.

By JUDGE PERRY. It is the opinion of this Court, that a certiorari should have been awarded on the defendant's motion to bring the papers into the County Court, because he was not bound to recognise any proceedings returned into that Court, except such as were returned in obedience to a certiorari. Then as there was none, and as the Court dismissed the cause, the judgment must be reversed, and the cause remanded.

By JUDGE CRENSHAW. I think the certiorari was unnecessary, and that the cause ought to be remanded for a trial *de novo*.

Reversed and remanded.

JANUARY 1890

## WADE V. KELLY &amp; HUTCHISON.



1. Where the defendant pleads to the merits, after a plea in abatement is overruled, he thereby waives all right to revise the decision on it.
2. Clerical mistakes apparent on the record, may be amended in the Court below, on motion.
3. But this Court will correct such mistakes, at the costs of the plaintiff in error.

R. WADE prosecuted this writ of error to reverse a judgment obtained against him in Jefferson Circuit Court, by Kelly and Hutchison, in an action of debt on a note for \$500. The errors assigned are stated in the opinion delivered.

PECK, for the plaintiff in error, submitted the cause, and cited 1 Chitty's Pleading, 438-9, 448, 453. Minor's Alabama Reports, 92, 100, 102, 187. Laws of Alabama, 463-4.

W. K. BAYLOR, for the defendants.

By JUDGE TAYLOR. The only errors assigned in this cause which can be noticed, are the second and third.

The 2d is, that "the Court below erred in *overruling* the plea in abatement." After the plea was "*overruled*," the defendant pleaded to the merits; by doing this, according to previous decisions of the Court, he waived all irregularities in the proceedings relative to that plea.

The 3d assignment is, that "the Court erred in giving judgment for \$500 debt, and \$47 damages." The action was instituted on a note for \$500. In the indorsement on the writ, it is stated by the plaintiff's counsel that the note was credited by \$30; the defendant, before pleading in abatement, craved oyer of this indorsement and set it out. The defendant, at the trial term, withdrew his plea, and judgment was taken by *nil dicit*, without the intervening of a jury, for the whole amount of the note, without deducting the credit indorsed on it. By statute, mistakes of this kind can be rectified upon motion in the Court below, but where it appears in this Court that such mistake has been made, it may be corrected at the costs of the plaintiff in error.

Let such judgment be rendered here as should have been rendered in the Court below, at the costs of Wade.

Reversed and rendered.

JANUARY 1836.  


## COBB V. REED.

In an action on a note for the payment of specific articles, where no place of payment is designated, it is not necessary to prove a demand of the articles. The defendant may plead his readiness to pay, in bar.

THIS was an appeal from a justice's Court, taken by certiorari into the County Court of Shelby county, and there tried. The action was by Cobb against Reed, on a note as follows:

"On or by the first day of April next, I promise to pay David Cobb, or bearer, two second rate young cows and calves, value received, 17th November, 1825.

"J. B. REED."

On the trial, the plaintiff read the note to the jury, and proved the value of the cows and calves to have been, when the note fell due, \$24 or 25; and on this proof he rested the case. The Court, at the request of the defendant, instructed the jury that it was necessary to entitle the plaintiff to recover, that he should have proved a demand of the cows and calves, when the note became due, or before the commencement of the suit. To this the plaintiff excepted, and this instruction is now assigned by him for error.

PECK, for the plaintiff in error, submitted the case without argument.

MARDIS, for the defendant.

*a* Minor's Ala.  
R. 411.

31 Stew. 524.

By JUDGE COLLIER. This Court, in *Lane v. Kirkman*,<sup>a</sup> though the point was not directly presented, held, that in contracts for the payment of specific articles, where no place of delivery is expressed, the residence of the debtor, by legal construction, is understood to be the place where payment should be made. And in *Thaxton v. Edwards*,<sup>b</sup> it is held, that if the defendant be prepared to deliver the articles expressed in the contract when due, he should plead it, and if proved, it would be an available defence to the plaintiff's action; and that it is no defence to say that there had been no demand by the plaintiff. Without further examining the question presented, upon the authority of the cases referred to, the judgment must be reversed, and the cause remanded.

JANUARY 1880.  


## GRANT &amp; CONNER V. PETTYBONE.

The record recited that C. was security in an appeal, but the bond was on file, by which it appeared that one P. was the security. The mistake may be here corrected by reference to the bond, and judgment rendered against the proper party.

A judgment was rendered against Grant in favor of Pettybone, by a justice, from which he appealed to the County Court of Pickens county. In the County Court, judgment was given against him, and also against W. F. Conner, reciting that he was security in the appeal bond. In the record there appeared an appeal bond, in which one Parker was security, and no other bond appeared. It is assigned for error, that the judgment was rendered against Conner, who was not the security of Grant, whereas it should have been against Parker.

KELLY, for the plaintiff in error.

STEWART, for the defendant.

By JUDGE TAYLOR. It appears that Parker was the security in the appeal bond, and that the County Court gave judgment by mistake against Conner as such. This was error for which the judgment must be reversed, and the correct judgment rendered here.

## BIGGER, adm'rx. v. HUTCHINGS &amp; SMITH, adm'rs.

1. A judgment obtained on an original attachment in a sister State, is *prima facie* evidence of the debt here.
2. But such judgment may be impeached by a plea shewing that the defendant constantly resided here, and had no notice of the suit.
3. Suing out a previous writ, is not sufficient evidence of presentation to an administrator, to take the case out of the statute which requires the claim to be presented within 18 months.
4. If the claim originated out of the State, so as to be within the exceptions of the statute, that matter must be specially replied to a plea of non claim.

THIS was an action of debt brought in Montgomery Circuit Court, in 1824, by Robert Hutchings, administrator, and Elizabeth Smith, administratrix, of Samuel

JANUARY 1830

Bigger, admx  
v.  
Hutchings &  
Smith, ad-  
ministrators.

Smith, jr. against Elizabeth Bigger, administratrix of Joseph Bigger, to recover on an exemplification of a judgment obtained by them against Joseph Bigger, in his life time, in the Superior Court of Jones county, Georgia, in November, 1820. The declaration was in the usual form, on the record of recovery in Georgia. The defendant pleaded, 1st. *nul tiel record*; 2dly. A special plea, alleging, that "at the time of the commencement of the suit in Georgia, and ever afterwards, her intestate was a permanent resident citizen of Alabama, and not a resident of Georgia, and that he had no notice of the commencement of the suit in Georgia;" and 3dly. "That the claim had not been presented within eighteen months after the letters of administration had been granted to her on Joseph Bigger's estate." Issue was joined on the first and third pleas, and the plaintiffs below demurred to the second plea. At March term, 1825, the issue on the plea of *nul tiel record*, was submitted to the Court, and the plaintiffs produced an exemplification of the record of a judgment which appeared to have been rendered in Georgia on an original attachment, and without personal service of process; on which evidence the Court gave judgment for the plaintiffs, on the plea of *nul tiel record*. The Court also sustained the demurrer to the second plea. At September term, 1825, the issue was tried on the third plea. It was admitted the action was not commenced within eighteen months after the grant of administration, but the plaintiffs relied on the fact that a previous writ had been issued from the Circuit Court of the same county, in favor of the plaintiffs, for the same claim, which had been served on the defendant before the eighteen months had elapsed, on which writ the plaintiffs had taken a non-suit. The Court instructed the jury that this was sufficient evidence of a presentation to take the case out of the statute; to which the defendant excepted. A verdict was found for the plaintiffs, and they had judgment. The defendant appealed, and assigned these several decisions as error.

GOLDTHWAITE, for the plaintiff in error. The decision of the Court in *Miller v. Pennington*,<sup>a</sup> will compel us to abandon the first assignment of error. The second plea, however, was good; it shews that the defendant was a non-resident, and had no notice of the suit in Georgia. This plea fully comes up to all the authorities on the subject, and does not conflict with the case above cited.<sup>b</sup> The

<sup>a</sup> Ante p. 399.

<sup>b</sup> 4 Cowen, 399. 2 Cowen

Court then erred in sustaining the demurrer to it. The Court also erred in the instructions given to the jury. A suit commenced is no notice to an administrator, especially where the plaintiff voluntarily abandons it. The demand was then never presented as is required, by law, and it was barred by the statute.<sup>a</sup> It is no answer to say that the debt was contracted out of the State, and that it comes within the exception of the statute; if the plaintiffs had replied the exception of the statute, the defendant by rejoinder could have shewn, that although the judgment was obtained in Georgia, yet that the debt was actually contracted in Alabama. Suppose the same pleadings to be on the statute of limitations, could the plaintiffs, under the common issue, avail themselves of the exceptions? Certainly not, they would be bound to reply the exception specially.

JANUARY 1830

Bigger, admx  
v.  
Hutchings &  
Smith, ad-  
ministrators

<sup>a</sup>Laws of Ala-  
page 337.

BUGBE, contra.

By JUDGE CRENSHAW.\* By the opinion pronounced at the present term in the case of *Miller v. Pennington*, it is settled, "that the exemplification of a judgment in attachment from a sister State, is *prima facie* evidence of its validity, and that to shew it to be otherwise, it is necessary that the defendant should impugn it by special plea." According to this adjudication, the presiding Judge was correct in giving judgment for the plaintiffs, on the plea of *nul tiel record*, and the plaintiff in error has consequently abandoned this assignment.

On the second assignment of error, we are of opinion, that it was erroneous to sustain the demurrer to the plea of the defendant, which alleged that her intestate was a citizen resident in Alabama, and had no notice of the commencement of the suit in Georgia.

The decision in the case of *Miller v. Pennington*, to which reference has just been had, and I might add, the reasoning in the determination at the present term, in the case of *Lucas v. The Bank of Darien*,<sup>b</sup> strongly imply that this was a good plea in bar to the action. In the former case, it is expressly said, that the validity of such a judgment may be impeached by special plea, and in the latter, the principles settled maintain the position, that

<sup>b</sup> Ante p. 200.

\* This case was argued at the last term, and retained under advisement and re-argued the present term.



JANUARY 1830.

Bigger, admx  
v.Hutchings &  
Smith, ad-  
ministrators.

at Cow. 292.

where the defendant is out of the jurisdiction of the Court, and has no opportunity to defend the suit, no personal service of the writ, or no notice of its commencement, he may plead those facts and circumstances in bar, to an action on the judgment. If the defendant continually resided in Alabama, and had no notice of the commencement of the suit in Georgia, it is a legal inference that he had no opportunity to defend the suit there, and that consequently the judgment cannot be conclusive on him. In *Shumway v. Stillman*,<sup>a</sup> this is recognised as the correct doctrine in New York, and it was determined that a plea similar to the present one would be good, though in that case, the plea was held bad, because it did not aver that the defendant had no notice.

As to the third assignment of error, we are convinced that the presentation of the demand was not such an one as is contemplated by the statute. The statute declares, that claims not presented to the administrator within eighteen months after the grant of administration, shall be forever barred from a recovery, except debts contracted out of the State, &c.

The Legislature who enacted the law, intended something more certain and definite than a mere notice that there was a claim against the estate. They clearly intended that the administrator should be furnished with such vouchers or reasonable evidence, as might induce a belief that the claim was just; with something more than the mere service of a writ. The original bond, note, or contract on which the debt accrued, or at least an abstract, or copy, should be presented as evidence of the claim, and if the claim arise on an open account, unliquidated demand, verbal contract, or legal liability, it should be reduced to writing, and be so presented.

We are further of opinion, that if the debt were contracted out of the State, this would be a matter of special replication to the defendant's plea, and cannot be legally inferred from the circumstance that the judgment was obtained in Georgia.

From the foregoing premises, the following deductions are the necessary result, and may now be considered as settled; 1st. That a judgment obtained in attachment in another State, is *prima facie* evidence of its validity; 2d. That such a judgment may be impeached by the plea, that the defendant continually residing here, had no notice of the commencement of the suit; and 3d. That the

suing out a previous writ for the same demand, within the eighteen months, does not take the case out of the statute of non-claim. ✓

JANUARY 1830

Bigger, admx

v.  
Hutchings &  
Smith, ad-  
ministrators.

---

It will be readily perceived, that some of the principles decided by the opinion which was pronounced in this case two years ago, are now overruled. New lights since that time received, subsequent decisions, and mature reflection, have brought us to our present conclusion. The question was then new; it has been since debated in several cases, and many convincing authorities have been adduced which would well warrant a change of opinion in a few particulars.

For the reasons above mentioned, this Court are now unanimous in reversing the judgment of the Circuit Court, and remanding the cause.

JUDGE SAFFOLD not sitting.

---

### GARROW V. HALLETT.

Where a purchaser of land receives from the vendor a covenant for possession, and for a deed of release and quit claim of all the vendor's interest, and such deed is tendered, a plea that the vendor had, and still has no title to the premises, contains no defence against an action for the purchase money, no fraud being alleged.

W. R. HALLETT instituted an action of covenant in Mobile Circuit Court, on certain articles of agreement, made under seal between them, dated the 14th of March, 1826, whereby Hallett covenanted "that he would well and sufficiently convey by deed of *release or quit claim* to Garrow, his heirs and assigns, on or before the first day of December next, after the date, all his interest in a certain lot of land in Mobile, &c." and Garrow, on his part, covenanted "that on the execution of said conveyance, he would give his note payable to Hallett, for \$1750, due the 1st January, 1827, at the bank of Mobile, as and for the purchase money, and also execute a mortgage on the premises." And it was further agreed "that Garrow might forthwith enter upon the premises, and receive the profits to the use of himself, his heirs and assigns;" and for the faithful performance the parties mutually bound themselves

JANUARY 1830.

Garrow  
v.  
Hallett.

in the sum of \$3,500. The plaintiff, in his declaration, averred performance on his part, and a tender of the deed by him such as the articles required, and that the defendant refused to receive it, and refused to execute his note for the purchase money, and the mortgage &c. The defendant cravedoyer of the agreement, and then pleaded, that, "at the time of making the agreement, the plaintiff, Hallett, had no right or title whatsoever to the premises thereby covenanted and agreed to be conveyed to the said defendant; nor hath he, since the making of the covenant, acquired any right or colour of right or title to the premises thereby agreed and covenanted to be conveyed to the defendant," &c. This plea was demurred to by the plaintiff. At May term, 1827, the demurrer was sustained, and at February term, 1828, the damages, on a writ of inquiry, were assessed at \$1,909 05, for which the plaintiff had judgment.

The judgment sustaining the demurrer to the plea is assigned for error.

**ACKE**, for the plaintiff in error. The only question presented for the decision of the Court, is, whether a man shall be compelled to pay for a thing which he has not received, could not, at the time of the contract receive, and never can receive, from the original and continued inability of the seller to make title to, or deliver possession of it. We think it must be supererogatory to cite authority to prove one of the most self-evident axioms in morals. We will, however, refer to 2. Blackstone's Commentaries, title, *deed*, 4 Cruise title 32. chapter 2, section 1, pages 13 and 14. 16 Johnson's Reports, 48. 3 Johnson's Reports, 480.

**ELLIOTT**, for the defendant in error. The demurrer was properly sustained. The declaration was good and proper; <sup>a</sup> but the plea was defective in several respects; <sup>b</sup> 1. It departed from the count, and was not responsive to it; 2. It contradicted and departed from the defendant's own covenant; 3d. It did not offer such an issue as when traversed and found for the plaintiff, would dispose of the merits of the case; it neither admits nor denies the performance of the plaintiff's covenant's, nor does it admit the performance of those covenants by the plaintiff, and at the same time allege matters to excuse performance by the defendant; 4th. Because admitting so far as the demurrer

<sup>a</sup> Chitty's Pl. 315.

<sup>b</sup> 1 Chitt Pl. 482, 483.

admits the truth of the facts stated in the plea of the defendant, it is not a legal defence. The law is against the plea. It is not pretended there was *mala fides*, or fraudulent concealment in this case as relates to the title. The stipulations and true meaning of the contract as expressed, must govern the case, and it will not, even by implication, admit of such a construction as would require the plaintiff, as a condition precedent to his recovery against the defendant, to procure or arm himself with any other interest in the lands contracted for, than that which he possessed when the contract was entered into.<sup>a</sup>

JANUARY 1830.

Garrow  
v.  
Hallett.

a 12 John. 430  
11 John. 359.  
Minor v. Ala.  
Rep. 165. 5  
Litt. 247-8.

By JUDGE SAFFOLD. It may be premised, that after making the usual allowance for the zeal of counsel, and the latitude of forensic debate, the discussion in this case is strongly illustrative of the fact, that very eminent counsel, even on questions of ordinary magnitude, may imbibe thorough convictions favorable to opposite principles, corresponding to their wishes. It is conceived to be highly probable, as was earnestly insisted by the counsel on both sides, that each was entirely sincere in his belief that he was fully sustained as well by the authorities as by the justice of the case. A slight examination of the authorities may aid in reconciling the conflicting views taken of the subject.

The cases of *Jackson v. Alexander*,<sup>b</sup> and of *Jackson v. Florence*,<sup>c</sup> cited by the counsel for the plaintiff in error, are found to refer only to the import of the words "for value received" in a deed; the consideration necessary to raise a use to the bargainor, under the statute of uses; the effect of the words "make over and grant," in a conveyance; and the sufficiency of the consideration necessary to render a deed of bargain and sale operative. Here, the question is not whether the consideration was sufficient to afford validity to the deed, for as to that, there is no contest; but it is objected that the deed affords no sufficient consideration to sustain the promise for the purchase money. The case of *Van Eps v. The Corporation of Schenectady*,<sup>d</sup> referred to on the part of the defendant, only recognises the principle so far as was intended to apply to this case, that where a vendor has covenanted to execute a deed to the vendee, his heirs and assigns forever, no greater duty or obligation can be intended than to execute a conveyance or assurance of the property which may be good and perfect without warranty or personal covenants.

b 3 John. 484.  
c 16 Ib. 48.

d 12 John. R. 436.

JANUARY 1830.

Garrow  
v.  
Hallett.

a 5 Litt. 247.

The obligation for covenants in deeds, depends on the terms of the contract, and the principle as above declared, rests on the presumption that if personal covenants were intended by the contract, they would have been expressed. The case of *Young v. Triplett*,<sup>a</sup> bears a stronger analogy to the present one. It was on a note given on a contract for the purchase of land. The defendant relied on a special plea, containing, among other matters, an averment, "that the vendor, at the time of making the conveyance, and since, had no sufficient title, and had not transferred to the purchaser, either title, or possession of the land sold; and that the consideration had utterly failed. A general demurrer to the plea having been sustained, the appellate tribunal observed, that the plea did not accuse the vendor of fraud, for notwithstanding it stated that he made promises which he was unable to perform, and representations which turned out to be untrue in the event, yet it did not allege that he knew the defects of title at the time of the sale, and failed to disclose them, or represented them to be otherwise contrary to what he knew; that of course there was no imputation of fraud, but the plea might have been true, and the vendor might have innocently made the contract, supposing he had the title, and could pass the possession; and on that ground, the plea could not be sustained. Nor did the plea put the defence upon the ground of a mutual mistake between the parties; for, from any thing that appeared, the vendee himself might have been conversant with, and have well understood all the defects of title, and prospects of possession, and have run the risk of all these; and it was competent for him to do so; that this deed appeared not to contain any clause of general warranty, and that it indicated in some measure at least, a risking bargain.

This may be regarded as an authority sustaining the principle, that where there is neither fraud, false warranty nor mistake, the contract cannot be avoided on the ground of defect of title. How the law should be expounded in a suit on articles containing covenants for a description of title, which it has been ascertained the vendor is incapable of making; or in case of actual breach of covenants in the deed previous to the institution of the suit for the purchase money, it is unnecessary in this case to inquire. It is not contended that these articles covenanted for any other than a deed of *release*, or *quit claim*. The plea only avers the insufficiency, or want of title in the

JANUARY 1880.

Garrow  
v.  
Hallatt.

vendor: nor does it admit or deny that he had performed his covenants according to their true intent and meaning. It does not negative the presumption arising from the terms of the contract, that the plaintiff was well acquainted with all the circumstances of the title, or that it was understood, and admitted, that the vendor had but a defective title, or only a possessory claim. Nor does it deny that the purchaser, according to the terms of the articles, has received the possession, and has enjoyed all the use and profits that were contemplated. It is a rational and legal presumption that some of these are the facts of the case, or that the purchaser had been disappointed in some contingency affecting the title, which he voluntarily contracted to risk, else why the covenant for a mere release or quit claim deed? And why has not misrepresentation of title, some other species of fraud, or a failure of consideration in legal terms, been averred in the defence?

It is the opinion of the Court, that the judgment below be affirmed.

By JUDGE COLLIER. I concur in the result of the opinion just pronounced, mainly on the ground that it was merely a sale of the plaintiff's interest, and that the conveyance agreed to be made was secondary, and implied an existing interest in the defendant.

JUDGES CRENSHAW and PERRY concurred for the same reasons.

Judgment affirmed.

The CHIEF JUSTICE not sitting.

#### WRIGHT V. MINTER.

To a declaration on a note, the plea was "that it was founded on an usurious consideration." The plaintiff replied that "it was not usuriously agreed that more than legal interest should be received;" the replication is bad.

P. P. WRIGHT had obtained a judgment before a justice of the peace of Tuscaloosa county, against W. J. Minter, on a note for \$31 75, made by him as security of one Enoch Elliott, who was a joint maker of the note with

JANUARY 1830.

Wright  
v.  
Minter.

Minter, but who was not sued. Minter appealed to the County Court, and there, Wright, the plaintiff, filed his declaration or statement, on the note. Minter pleaded that "the note was founded upon a *usurious consideration* between the plaintiff and Elliott," and that the defendant was only security. To this plea, the plaintiff replied, that "it was not usuriously agreed by and between the said plaintiff and said defendant's principal, that more than legal interest should be reserved or taken." The defendant demurred to the replication, and at the August term, 1828, of the County Court, the demurrer was sustained, and judgment was rendered for the defendant. This decision is here assigned for error.

ELLIS, for the plaintiff in error. The demurrer to the replication should have been overruled. The replication was proper; but if it was not, the plea was bad, and the demurrer reaches into the plea. This is a well settled doctrine. Then is not the replication sufficient? I think it is. Replications are of several descriptions; 1st. Such as conclude the defendant by estoppel; 2d. Such as deny the truth of the matter alleged in the plea in whole or in part; 3d. Such as confess and avoid the plea; and 4th. When the plea is evasive, such as new assign the cause of action. The replication in this case is one of the second class. It contains a denial of the whole plea; it is single and confined to the point presented by the plea; it responds to the plea, by substantially denying it, so as to create an issue capable of trial. It can certainly be no objection that it covers too much ground, that while the plea is confined to the consideration merely, the replication goes to the whole contract. When the replication says there was no usurious agreement, does it not necessarily say the consideration was not usurious? It does at least directly negative the plea. It is certainly a good replication according to the precedents and authorities.<sup>a</sup> A replication may deny the corrupt agreement, and conclude to the country, without a formal traverse.<sup>b</sup> The statute of 1819,<sup>c</sup> at the end of the 2d section, and commencement of the 5th section, uses the terms "usurious agreement." It seems to me the true test, is, whether if issue be taken on the replication, the jury can determine if the contract be usurious or not. But is the plea sufficient? The case of *Wright v. Elliott*,<sup>d</sup> is relied on to sustain the plea, and defeat the replication; but the question is not here what does

<sup>a</sup> 3 Chitt. Pl.  
1172. 2 T. R.  
439. 1 Saund.  
103. b. n. 3.  
<sup>b</sup> 7 John. R.  
203.

<sup>c</sup> Laws of Ala.  
444.  
<sup>d</sup> 1 Stew. 391.

or what does not constitute usury: it is a question of pleading merely. I will not stop to inquire whether a plea by a surety who is sued alone, alleging usury between the plaintiff and the defendant's principal, can ever be good, which, however, might admit of doubt, from an examination of the case of *Ford v. Keith*,<sup>a</sup> which determines that a security may recover money paid for his principal upon an usurious contract made by the principal, without the knowledge of the surety; but the plea is defective, as will be seen by reference to approved forms, and the rules of pleading. It is too narrow; it refers to the consideration merely of the agreement, which is a constituent part only of the contract; it should have referred to the whole agreement or contract, which is made up of three component parts, of which the consideration is but one.<sup>b</sup>

Courts of justice of late have always leaned in favor of the decision of causes on their intrinsic merits, disregarding technical niceties, tending to defeat inquiry. In cases of appeal, technical nicety is not observed in pleading. It is obvious that if this judgment is affirmed, the cause will have turned on a technical point of pleading, without examination of the merits.

P. N. WILSON, contra. That Minter was a security, can make no material difference in the law of the case; the merits of the contract between the plaintiff and the principal, must fix the rights and liability of the parties.

The case of *Wright v. Elliott*, decided in this Court on this same note, fully sustains the position, that usury may be committed without excessive interest having been stipulated for between the parties; that although there was "no contract by which the defendant agreed to pay the plaintiff more than legal interest," yet there was a "*contract*" in which the plaintiff did *take* more than eight per cent. and that the contract may be usurious, as being founded on a *usurious consideration*, though the *agreement* be not usurious, and though in fact the promissor was ignorant of the usury at the time he promised to pay. The defendant chose to rest his defence on the distinct and separate ground, that although he admitted impliedly that the *agreement* was not usurious as related to both the parties, that yet the *consideration* on which the promise was founded, was so. The replication, however, only traversed what the plea by implication admitted, or at most, only controverted the existence of a fact not alleged in the

JANUARY 1830.

Wright  
v.  
Minter.

a 18 Mass. R.  
139.

b 2 B. Comm.  
442. 3d Chit.  
Pl. late Edit.  
967. 1 Saun  
295, a. b.



JANUARY 1856.

Wright  
v.  
Minter.

1 Chitt. Pl.  
619. Co. Litt'  
304, a.

1 Chitt. Pl.  
618, 577 to  
586.

1 Chitt. Pl.  
578, 4 T. R.  
157.

plea, or relied on as a ground of defence. To have taken issue on this replication, would have compelled the defendant to commit a departure in pleading; which is not allowable.<sup>a</sup>

A replication must contain sufficient matter to avoid or disaffirm the plea, either by estoppel, confession and avoidance, or general or special denial.<sup>b</sup> The one here filed, as it relies on no new matter, must be taken as intending to have denied the plea; but it assumes a different ground than the plea did. It leaves an acknowledged matter of defence averred in the plea, unanswered, and answers one not assumed by it; thereby changing the issue from the point on which the defendant placed it, to such one as the plaintiff choose to select, which it is not competent for him to do.<sup>c</sup> Though he has been so skilful as to obtain a promise of usurious interest without the knowledge of the promissor, he cannot now be permitted to evade the question of the corruptness of the consideration, and defeat the defence of the defendant by placing the issue, without his consent again, on a question which will shut out all investigation of the true point of defence. There was nothing more easy than for the plaintiff to have replied that the note was not founded on an usurious consideration. This would have been a full denial of the plea, and would have placed the issue on the point the defendant elected to rest his defence on; which he had a right to do.

By JUDGE TAYLOR. It is insisted by the counsel for the plaintiff in error, 1st. That the replication is a sufficient answer to the plea; 2d. If it is not, that the plea is insufficient.

It is unnecessary to cite authorities to sustain the doctrine, that a replication which tenders an issue to the country, must deny the whole plea, and put in issue every material matter which could be introduced in the defence under the plea. In this case, the plea is, that "the consideration of the note" was usurious; the replication, which professes to deny that plea, is, that "it was not agreed by and between the plaintiff and defendant's principal that more than legal interest should be reserved," &c.

Under the plea, the consideration of the note may be inquired into, for the purpose of proving it to be usurious, no matter from whom that consideration passed, or how it arose. By the replication, this investigation is narrowed down to the inquiry, "did the plaintiff and Elliott mutually agree that usury should be reserved?"

JANUARY 1830

Wright  
v.  
Minter.a 1 Stew. R.  
page 391.

In the case of *Wright v. Elliott*, <sup>a</sup> decided, in this Court, it was determined, that if the payee practice an imposition upon the payor, and wilfully take from him a note for a larger sum than the debt, and legal interest, it is usury, although the payor did not know at the time that more than he legally owed was embraced in the note, and this decision I feel no disposition to overrule. It is not required by our statute "that the *parties* shall corruptly enter into a contract by which more than legal interest is reserved," to make that contract usurious. But it is declared that "no person or persons, shall, upon any contract whatsoever, take directly or indirectly for the loan of any money, wares, merchandise, &c. more than the rate of eight dollars for the forbearance of one hundred dollars," &c. Certainly then, if the payee overreaches the payor, and exacts more than legal interest, he does, by the contract, "directly or indirectly take" more than eight per cent. Suppose such had been the fact with regard to the present case: the plea would have embraced such a defence, but the replication would exclude it entirely. The replication therefore, is certainly bad.

As to the second position taken by the defendant, it is certain that the plea is not technically good; but it has often been determined in this Court, that in these small cases, if the material facts can be tried under the pleadings, they will be sustained. A formal declaration is never required, but only such a one as contains a substantial statement of the cause of action, for which reason it is more usually termed a "statement" than a "declaration." A plea of a similar kind is all that should be required, more especially as the issue is to be made up under the direction of the Court. The plea in this case was calculated to admit every inquiry material to the investigation.

By JUDGE CRENSHAW. Taking for granted that the plea of the defendant is good, it becomes material to inquire whether or not the replication is a denial of, or sufficient answer to that plea. There is no doubt but that the replication was intended as an answer to or denial of the matter of the plea, and therefore properly concludes to the country; and to my mind it is equally clear that it is a substantial answer to the plea. By the consent of parties to plead in short, the technicalities of form were dispensed with. The question which then occurs, is, was the replication in substance a sufficient answer to the plea?

JANUARY 1830.

Wright  
v.  
Minter.

a 7 John. Rep.  
283.

To say that the note was given for an usurious consideration, is substantially the same as to assert that it was usuriously agreed. Though the consideration is a part only of the agreement, yet it is a most vital part, and on the sufficiency of which depends the validity of the agreement. If the consideration was usurious, the agreement must be equally so. The gist of the plea and point presented, is usury, and the substantive fact asserted by the replication is, that there was no usury. In the case of *Waterman v. Haskin*,<sup>a</sup> a replication to a plea of usury, similar to the present one in all respects, was held to be good, and it was said that it might conclude to the country. In that case, reference is had to a number of reputable authorities, all tending to establish the same rule of pleading.

If the decision in the case of *Wright v. Elliott*, contains any thing repugnant to these principles of practice, I am unable to discover it. In that case, the judgment was reversed, on the ground that the Judge charged the jury "that the ignorance of the defendant or borrower, did not take the case out of the statute of usury." And that if the difference between the amount of money paid by the plaintiff on the execution, and the notes given by the defendant, was greater than the legal rate of interest, it was usury." It was decided that the charge was too broad, and that more than the legal rate of interest might be innocently reserved by inadvertence or mistake, and if so, it would not be usury. But surely by this decision, it could not have been intended to abolish the rules of pleading, or to establish any new principle in relation to usury? Usury is well defined to be a corrupt agreement to take or receive more than the legal rate of interest. This is the settled law in England as well as in several of the States, and I can perceive nothing peculiar in our statute of usury, which would require a different rule, and warrant us in departing from principles so well established by numerous precedents.

The corrupt intention to evade the law, and to reserve more than the legal rate, is the very essence of usury, and is a necessary ingredient to render a contract usurious. I am for reversing the judgment, and remanding the case.

Judgment affirmed.

## BOGGS v. BANDY.

A judgment on a *sci. fa.* against the obligor in an injunction bond, will not be reversed for error, though the bond, by statute, when forfeited, had of itself the force and effect of a judgment.

On the 21st of October, 1825, a bond was executed by L. Leftwich and George Boggs, jr payable to Richard Bandy, in the penal sum of \$1685 76, conditioned, that whereas, Leftwich had obtained an injunction to restrain further proceedings by Bandy, on a judgment at law which he had obtained against Leftwich, in Lauderdale Circuit Court; that if the said Leftwich should prosecute the said bill of injunction to effect, or in case of failure, then if he paid the judgment or decree of the Court, to be void, else of full force, &c. On this bond. on the 18th of September, 1827, Bandy issued a *scire facias* against Boggs, and at October term, 1827, of said Court, recovered a judgment by *nil dicit* on it for \$842 88, and \$134 86 damages and costs.

COALTER, of counsel for Boggs, assigned for error in this Court, among other matters which it is not necessary here to notice, that the *scire facias* would not lie on this bond, and that it was not the proper remedy; wherefore the judgment was improper.

W. B. MARTIN, for the defendant. The bond was taken in pursuance of the order of the Chancellor, attested by the clerk, and filed. It is thereby made a part of the record in the Chancery suit, and therefore is a proper foundation for a *scire facias*. If this ground is not sufficient, then we insist that by the acts of the 4th and 12th of January 1826,<sup>a</sup> a judgment is authorized against a security in an injunction bond, at the time the judgment is rendered against the complainant in equity; such judgment is equal to a verdict against the security, and it becomes a debt of record. Then, inasmuch as no judgment was then taken against the security in this case, therefore a *scire facias*, or something similar, which gave notice to the party, was necessary, and nothing more. The defendant failed to plead or demur to the *scire facias*, and the judgment rendered by *nil dicit* is as conclusive as if rendered on

<sup>a</sup> Acts of 1826  
p. 13 & 79.

JANUARY 1830.

Boggs  
v.  
Bandy.

a 7 Mass. R.  
507. 2 Bur-  
rows, 936.

verdict. It is no objection to say that the *scire facias* should not lie because it creates costs, and that the judgment should have been taken against the security at the time the judgment was rendered against the complainant in equity. The same reason might be given where a plaintiff delays issuing execution on a judgment until after a year and a day, and it becomes necessary to revive the judgment; the expense of revival is always allowed; the reason is that the debtor could and should have satisfied the demand. It is also an acknowledged principle, that Courts will never reverse a judgment, for the purpose of turning a party round to another action to produce the same result. The *scire facias* was an action which did produce a proper result, and therefore the judgment should not be disturbed.<sup>a</sup>

By JUDGE WHITE. None of the assignments of error in this case are sustained by the record, except those which question the legality of proceeding by *scire facias*, upon a forfeited injunction bond. By the act of Assembly of the 12th January, 1826, it is provided, "that all and every bond or bonds executed for the purpose of obtaining an injunction or injunctions, shall, on the dissolution of said injunction or injunctions, have the force and effect of a judgment; and it shall be lawful for the party or parties, whose judgment may have been enjoined, to take out execution against all the obligors, in the bond or bonds, for the amount of the judgment which shall have been enjoined, together with lawful interest thereon; and also the costs incurred in and about the said Chancery proceedings." From the provisions of this law, it is manifest the plaintiff below might have had his execution without the aid of a *scire facias*. But the issuance of the writ, by notifying the defendant, operated to his benefit, and cannot be complained of by him; and although unnecessary, we conceive it was not erroneous to proceed in that manner.

The judgment of the Court below, must therefore be affirmed.

By JUDGE COLLIER. With due deference, the opinion of the Court, in my apprehension, is not sustainable either upon principle or authority. And whether we consider the case upon the assumption, that the act of the 12th January, 1826, does not influence the remedy upon injunction bonds executed previous to its passage, or up-

on the hypothesis, that the act is operative upon bonds of an anterior date, the legal conclusion must be the same.

It is doubted in some of the old books of authority, whether a *scire facias* lay at common law; but Lord Coke says the doubt arose from a neglect to distinguish between personal and real actions. In the former, it was given by the statute of Westminster 2. 13 Edward 1, statute 1, chapter 45. In the latter, as well as mixed actions, it was a remedy existing at common law.<sup>a</sup>

On recognizances at common law, no *scire facias* lay until it was given by the 2d Westminster. Since the enactment of that statute, a *scire facias* may be defined to be a judicial writ or action, founded on some matter of record, as judgments, recognizances, and letters patent.<sup>b</sup> Now it is obvious, that the bond in question is not a matter of record; nor can it with propriety be distinguished as a judicial act. It was not taken by direction of any statute, but under the *fiat* of the Judge awarding the injunction, by the clerk of the Court, in the performance of his ministerial duties. If a *scire facias* can be sustained on this bond, it would be difficult to conceive of one taken by an officer of a Court of record, on which that remedy would not be proper. In my opinion, the proper remedy on all bonds taken by ministerial officers of Court, independent of general or special legislation controlling, is an action of debt, or other appropriate common law action.

The common law has been doubtless repeatedly supposed to be co-extensive with the statute of Westminster 2d; and this mistake has happened from a neglect of many of the adjudged cases, to refer to that Statute. But if the statute itself could be considered as expressive of the common law, for the reasons stated, it is apparent to my mind that the bond is not a fit subject for the remedy by *scire facias*. I am not inclined to controvert the position impliedly assumed in the opinion of the Court, that the act of the 12th January, 1826, does operate retrospectively, so as to extend its influence to the remedy upon the bond. This construction furnishes a sufficient reason why the judgment should not be sustained. By that act, the bond itself, on a dissolution of the injunction, is declared to have the force and effect of a judgment, and execution may thereupon be issued against all the obligors. Is it proposed to effect more by the *scire facias*, than to obtain a judgment upon the bond? Certainly not. By the judgment upon the *scire facias*, the obligee in the bond acquires no power

JANUARY 1830.

Boggs  
v.  
Bandy.

<sup>a</sup> Salk. 258,  
600. 6 Rac.  
Abridg't 104.  
3 Blac. Com.  
421. 6 Ja-  
cob's Law  
Dic. 22, and  
cases there  
referred to.

<sup>b</sup> 2 Term. R.  
46 and 267.

JANUARY 1830.

Boggs  
v.  
Bandy.

which he did not before possess, to coerce the payment of his judgment at law, and decree upon the bill. Surely it is no answer to this to say, that the proceeding by *scire facias* cannot prejudice, but will rather benefit the obligor. It is apprehended it would not be insisted, that after a judgment obtained against the maker of a note, another action could be sustained on the same note; though it might with equal force be urged that the defendant would be rather benefitted than prejudiced thereby, as he might obtain a delay, and interpose matters of defence, which the enforcement of the judgment would not allow. To my mind it is a sufficient answer to this argument, that by the entertainment of the *scire facias*, the defendant is unnecessarily and vexatiously mulct in costs.

In every point of view in which I can conceive of the case, I am of opinion that the judgment should be reversed.  
Judgment affirmed.

#### SEWALL V. BATES' adm'rs.

1. When a party has died after a judgment in the Court below, the clerk cannot, on the production of letters of administration, issue a writ of error, and thereby make the supposed administrators defendants thereto.
2. A writ of error thus issued, will be quashed on motion.
3. *Seemle*, that in such cases, application must be made to this Court for a *scire facias* to the representatives, or a certiorari to bring up the record, on a suggestion of the death, supported by sufficient evidence.
4. The citation, when the sheriff is a party interested, must be directed to, and executed by the coroner.
5. It is not sufficient to affect the sheriff with legal notice, that the citation was placed in his hands as sheriff, and returned by him as to a co-defendant, "not to be found."

IN a suit commenced by attachment, in Mobile Circuit Court, by Rufus Sewall against Daniel Stow, a replevy bond was taken by James P. Bates, then Sheriff of Mobile county; and at the February term, 1828, of the Court, Sewall filed exceptions to the bond, and moved the Court that Bates, the Sheriff, be held, and stand as special bail in the cause; which motion was, by the Court, at the April term, 1828, overruled. On the 15th of December, 1828, on the application of Sewall, the clerk of the Mobile Circuit Court issued a writ of error to this Court, in which it is recited that, "it being made manifest, from the

copy of the order and proceedings of the County Court of Mobile county, hereunto attached, that the said James P. Bates, since the rendition of the judgment aforesaid, has departed this life, and that Theophilus L. Toulmin, and Joseph Bates, jr. are his administrators," &c. and upon such recital, he proceeded to issue the writ of error against said Toulmin and Bates, as administrators, and thereby made them parties defendants in error in the cause, in this Court. To the writ of error, there was annexed a certified copy of an order from the minutes of Mobile County Court, shewing that letters of administration had been granted on the estate of James P. Bates, as above stated. A citation was issued to the administrators, Toulmin and Bates, directed to the sheriff of Mobile county, which was returned as follows: "J. Bates, the within named defendant, not found in my county. January 1, 1829, T. L. Toulmin, sheriff of Mobile county."

JANUARY 1830  
Sewall  
v.  
Bates' adm'rs

A motion is now made in this Court by the appellees to quash the writ of error; and if that should be overruled, then to dismiss it, because the citation had not been served on the defendants.

ELLIOTT, for the appellees.

GORDON, for the appellant.

By JUDGE TAYLOR. I am ignorant of any case in which a clerk is permitted to determine upon the sufficiency of evidence offered for the purpose of making new parties to a cause. Even where the death of a party is suggested in Court, the clerk has no power to revive the action, either in favor of, or against representatives. But in this case, he first judicially decides that the defendant is dead, and then that Toulmin and Bates, junior, are his representatives, and makes them defendants, without giving them an opportunity of contesting either of those facts. The uniform course in a court of justice, is, upon the suggestion of the death of the defendant, to issue a *scire facias* against such persons as from the production of satisfactory testimony, it appears, on this *ex parte* examination, are the representatives of the deceased, requiring them to shew cause at the next term of the Court, why the suit should not be revived against them.

In what way the representatives in a case situated like the present one, are to be made parties, I have not had an



JANUARY 1886.

Sewall  
v.  
Bates' adm'rs

opportunity of examining into authorities to enable me to determine, nor have authorities been cited by counsel; but I am inclined to the opinion, that application should, in the first instance, be made to this Court; either upon the suggestion of the death of the defendant below, and exhibition of a copy of the letters testamentary or of administration, and a copy of the record in the cause, to move for a *scire facias* against the representatives, to shew cause why they should not be made defendants, and a writ of error awarded from this Court to the Court below; or by a motion founded on the production of such evidence, for a *certiorari* to bring the proceedings of the Court below into this Court.

I am also of the opinion, that the service of the citation is insufficient. It cannot be considered as the acknowledgment of service by Toulmin, for it does not even appear that he is the man against whom the citation issued; and if that is admitted, he has only acted officially in all that he has done. A citation may justly be considered as process, and when process issues against a sheriff, it should be directed to the coroner; when this is not the case, but it is directed to the sheriff, against whom it is issued, something must be done equivalent to a waiver of all benefit from the irregularity, before the Court will consider the party as consenting to be affected by such process. No such inference can be made from the circumstances of this case.

The Court unanimously agree that the writ of error should be quashed.

#### MUSGROVE V. HUDSON.

On a question, whether or not a letter contains an acceptance of an order, the Court will look to the whole letter, and although it contains the words, "I shall accept," if from the whole, it appear no acceptance was intended, it will be construed as a refusal.

THIS action was originally brought before a justice of the peace of Walker county, by E. Hudson, against E. G. Musgrove, to recover fifteen dollars, the amount of an or-

JANUARY 1830.

Musgrove  
v.  
Hudson.

der drawn be one Glasscock, in favor of Hudson, on Musgrove. The cause was brought by appeal into the County Court. At the trial, Hudson, the plaintiff, to prove an acceptance of the order offered in evidence, a letter, written by Musgrove to him, as follows: "Mr Elijah Hudson, by these presents you will be informed, I do not know what is the amount of the order that you have from Glasscock, whether it is for so much money, or for so many head of cattle; but be it for what it may, I shall accept in your hands, as I have an authorized agent in Blount county, near to Glasscock, and I have had ever since last spring, to settle with Glasscock on fair terms. The cattle are here in possession, will stay here until Glasscock complies with his contract, unless they are stolen," &c. The defendant offered to prove by his own evidence on oath, that there was a mistake in the letter, the letter not being under seal, and the amount in controversy under twenty dollars. The Court rejected this explanatory evidence, as inadmissible, and gave judgment for the plaintiff, to which the defendant excepted, and sued his writ of error to this Court.

P. N. WILSON, for the plaintiff in error. Although the words, "I shall accept," are found in the letter, yet its whole tenor shews he did not thereby intend to accept it; the intent must govern in the construction, and here the intention to accept is repelled. It does not appear that the defendant was indebted to the drawer, therefore if a promise at all, it is without consideration and void. <sup>a</sup> If this position is not tenable, then we say that the letter was ambiguous, and that parol evidence should have been received to explain it. And on the ground of mistake, parol evidence was proper, even to contradict it. This being an appeal, and for a sum under twenty dollars, the Court has all the powers of equity, and consequently, that to relieve against a mistake. By our statute, the party himself was a competent witness, and in several points of view, the evidence which was offered by the defendant below, was admissible. <sup>b</sup>

ELLIS, contra. The question of the competency of the party as a witness, does not arise here; the objection was not as to his competency, but as to the admissibility of what he offered to testify; he was rejected because he offered to contradict by parol, written evidence; and that too, made by himself, and in his own cause. It would be dangerous in the extreme, however, under any circumstan-

<sup>a</sup> 10 John. R. 412. 11 John. 221. 4 John. 296.  
<sup>b</sup> 2 Starkie Evid. 33, note 2. 3 Starkie 966, 1029, 1028 and Note. Phillips' Ev. 77. Note B. 415. A. 2 Esp. N. P. 528, 5. 250 Note. 2 Dallas 70, 80, 170, 173, 180 196. 4 Dallas 132. 1 Term 182. 2 Term 371. 2 Vern. 98. 4 Cranch 172. 5 Vesey 87. 7 Mass. R. 297. 1 Call. 419. 2 Ib. 239. 4 Esp. Cas. 189. 1 John. Cas. 145. 2 John. R. 378. 3 Ib. 319. 5 John. 68. 8 Ib. 399. 9 Ib. 310. 12 Ib. 513. 16 Ib. 14.

JANUARY 1839.

Musgrove  
v.  
Hudson.

11 John. 201.  
3 Starkie's  
Ev. 1008.  
1 Car. Law R.  
263. 8 John.  
375 Phillips'  
Ev. Ch. 10.  
11 Mass. R.  
27.

ces, to permit a party when charged on his own act, to contradict the writing by swearing what his intention was, and to say, although I informed you I did accept, yet my intention was otherwise. The rule of evidence cannot be denied, that parol proof cannot be received to contradict, vary, or add to an instrument in writing, but only to explain and elucidate it, and then only in case of a latent ambiguity. "Then is there such a latent ambiguity as authorizes explanation? The emphatic words are used, 'I shall accept in your hands,' and these leave no doubt. The latter part of the letter is too ambiguous and uncertain, to destroy the force of language so positive.

By JUDGE COLLIER. We are of opinion that a just interpretation of the letter, is a refusal by the plaintiff in error, to accept the order of Glasscock. On the point, whether the mistake in the letter can be corrected by oral proof, as it is unnecessary to consider it, we forbear an expression of opinion.

Judgment reversed.

### MOORE et al. v. CHAPMAN, Judge of the County Court.

1. By mistake, in the condition of an administration bond, it was written, that if M. R. (who was the deceased,) should well and truly perform the duties of administrator, &c. the mistake being apparent on the face of the instrument, it was held that this did not vitiate, and that the bond might be declared on with proper averments.
2. After settlement, and a decree by the County Court, requiring an administrator to pay over a sum certain, a distributee may bring an action on the bond, and assign the non-payment as a breach of the condition.
3. And where the settlement is final, no refunding bond is necessary.

THIS was an action of debt, instituted in the Circuit Court of Madison, in the name of Samuel Chapman, Judge of the County Court, for the use of Charles W. Mixen and wife, heirs at law and legatees of Miles Rayner, deceased, against Lewis Moore and Fleming Jordan, as obligors in an administration bond, made in 1822. By the penalty of the bond, Moore, Jordan, and one M'Broom, bound themselves to S. Chapman, Judge, &c. in the penal sum of twenty thousand dollars, &c. The condition was as follows: "Now the condition of the above obligation is such, that

whereas the above bound Lewis Moore has been duly appointed administrator with the will annexed, of the estate of Miles Rayner, deceased. Now if the said Miles Rayner shall well and truly perform all the duties which are, or may be by law required of him as administrator with the will annexed, then the above obligation to be void, else to remain in full force and virtue," &c. In the declaration it is averred, after reciting the bond, that "whereas Moore had been duly appointed administrator with the will annexed, of the estate of Miles Rayner, deceased, the defendants undertook, that said 'Lewis Moore,' (but by mistake, written in the said condition, 'Miles Rayner') should well and truly perform all the duties of administrator," &c. It is afterwards alleged as a breach of the condition of the bond, that "on the 27th of August, 1827, said Moore, having in said County Court of Madison, made settlement of his administration of the estate of said Rayner, there was found to be in his hands as administrator, to be distributed among the heirs and distributees of Miles Rayner, the deceased, \$5,381 18; and that on the 19th of October, 1827, said Lewis Moore having been previously cited to appear and make distribution, it was by the County Court ordered and decreed, that he pay to said Mixen, in right of his wife, the sum of \$2,690 50; being their share as legatees of said Miles Rayner," which sum he had failed to pay, &c. The defendants cravedoyer of the bond and condition, and demurred. The demurrer was, by the Circuit Court, at May term, 1828, overruled, an inquiry of damages was had, and the jury assessed them at \$2,816 14, for which the plaintiff had judgment.

HUTCHISON & CRAIGHEAD, on behalf of Moore and Jordan, the appellants, assigned for error: 1. That the plaintiff, Mixen, having selected the orphan's Court, could not apply to any other Court, until he had exhausted all the powers of that Court unsuccessfully. 2. That the mistake in the bond could not be rectified at law, nor elsewhere; the form being prescribed by statute. 3. That the securities cannot be made liable by construction, or by proofs of mistake in the bond; that the condition is for their benefit.

BRANDON, for the defendant in error.

By JUDGE CRENSHAW. It is insisted that the demurrer should have been sustained; that no action can be

JANUARY 1830.

Moore  
v.  
Chapman.

JANUARY 1836.

Moore  
v  
Chapman.

maintained on the bond; and that the inquiry and assessment of damages were erroneous. In argument it was contended that this bond is not actionable, because the condition is absurd and unmeaning, in requiring Miles Rayner, the testator, to perform the duties of administrator on his own estate, and that the defect cannot be supplied by any averment or proof *aliunde*.

Without resorting to extrinsic circumstances, we are of opinion, that there is an obvious mistake apparent on the face of the instrument, but which cannot vitiate or render it ineffectual; that the name of Lewis Moore, the administrator, was clearly intended to be inserted, instead of Miles Rayner, deceased; that by a reference to the immediately preceding part of the condition, in which it is recited, that Lewis Moore had been appointed administrator of Miles Rayner, deceased, and by recurring to the fact that Lewis Moore is bound by name in the penal part, and executed the bond, it is manifest beyond a doubt, that he is the person on whom the duties of administration devolved, and who is required to perform the condition of the bond. And though the form of the bond be prescribed by statute, yet it is sufficient for the ends of substantial justice, if the material requisitions of the statute have been pursued, and the intention of the parties can be collected from the whole of the instrument taken together. We believe it to be the duty of Courts of justice, to give a consistent and sensible construction to all instruments of writing, *ut res magis valeat quam pereat*, and that we violate no rule of law in saying that this objection ought not to prevail.

It was also insisted, that the plaintiff had no right to resort to an action on the administration bond, before he had exhausted all the powers of the County Court, where he first sought his remedy, and before he had given to the administrator, a refunding bond. As to this position we are not prepared to say, nor is it necessary to decide the question before us, that the County Court had authority to enforce its decree for distribution, by process of attachment, execution, or any other mode pointed out by law. But whether the County Court had or had not this authority, we think it clear, that a distributee could sue on the administration bond, after distribution had been decreed by the County Court, where, by law, the administrator was accountable, and where he was required to settle his administration; and that if the administrator does not comply with the decree for distribution, it would be a violation of

his duty, and a breach of the condition of his bond; and render him liable to an action in behalf of the distributee.

As to the second branch of the proposition, we infer from the record, that the administrator had made, with the County Court, a final settlement; in which case the statute does not require a refunding bond of the distributee. In conclusion, we are further of the opinion, that there was no error in the inquiry and verdict for damages. Indeed, on the defendant's declining to plead over, there was no other legal course for the plaintiff to pursue, but to submit the case to the jury on an inquiry of damages for the breach of the condition of the bond; and in which they were to be governed by the amount of the decree, with interest from the time it should have been paid. The Court are unanimous in affirming the judgment.

JANUARY 1830.

Moore et al.

v.

Chapman.

---

REID v. GORDON.

2s	460
108	197
2s	460
110	531

1. In an action of trespass for an assault and battery, if the verdict is for \$ damages only, full costs cannot be given unless the Judge certifies.
2. It does not vary the case, though the jury find costs for the plaintiff.

In an action of trespass for an assault and battery, G. Gordon recovered against Thomas Reid, in Tuscaloosa Circuit Court, a judgment for \$5 damages and full costs of suit. The suit was commenced in September, 1825, and determined at March term, 1827. The verdict is in these words: "we find the defendant guilty, and assess the plaintiffs damages by occasion thereof to five dollars, *besides his costs.*" There was no certificate by the presiding Judge, for full costs.

The error assigned by Reid, is, that the Court erred in rendering judgment for full costs.

SHORTRIDGE & ELLIS, for the plaintiff in error, submitted the cause.

BARTON & STEWART, contra.

By JUDGE COLLIER. By the act to prevent frivolous and vexatious law suits,<sup>a</sup> it is enacted, "That in all suits which may hereafter be brought in this State to reco-

<sup>a</sup> Laws of Ala.  
Page 464.

JANUARY 1888.

Roid  
v.  
Gordon.

ver damages for slander, or trespass, or assault and battery, the plaintiff shall not recover more costs than damages, if the damages do not exceed five dollars, unless the Judge before whom the suit was tried, shall certify that more damages ought to have been awarded by the jury." By a reference to the record, the action appears to have been commenced several years after the passage of this act, and is therefore subject to its operation. The finding of costs by the jury cannot vary the case: the costs are a matter over which they had no control. It was only their duty to inquire of the guilt of the plaintiff in error, and if satisfied that he was guilty, assess such damages as their judgment might persuade them was proper; and if the Judge had thought the damages assessed were inadequate to compensate the injury, he should have certified.

The judgment is therefore reversed, and such judgment rendered here, as should have been rendered below.\*

#### THOMPSON V. MILLER.

1. Where the Court has made an order, requiring a non-resident to give security for costs, such order pre-supposes the necessary proof to have been made to entitle the party to such security.
2. But where the record shews only that the motion was made to the Court, and the Court afterwards entered the order *nunc pro tunc*, on parol evidence, that the Court had previously made such order, it was held to be error.
3. An order or judgment *nunc pro tunc* must be predicated on matter of record, or some memorandum of the Court.
4. Security for costs may be required as well in appeals from justices as in other cases.

THIS was an action commenced before a justice of the peace of Lauderdale county, by Thompson against Miller, in which the plaintiff recovered judgment. Miller appealed to the County Court. At the June term, 1828, this entry appears: "continued, and motion to rule plaintiff to security for costs." At December term, 1828, the defendant moved the Court to dismiss the suit, at the costs of the plaintiff, because he was a non-resident, and no security for costs had been given. This being resisted, the plaintiff proved by oral evidence, that, at the pre-

\*See the case of McGhee v. Evans, 1 Stewart's Reports, 589.

vious term of the Court, a motion had been made, and thereupon that the Court had ordered that the plaintiff give security for the costs by the next term, or that the suit should be dismissed; but that the order had not been entered of record. The Court caused the rule for security to be entered *nunc pro tunc* on the minutes, and then dismissed the cause accordingly. To all which Thompson excepted, and assigned the proceedings of the Court as above for error.

JANUARY 1836.

Thompson  
v.  
Miller.

W. B. MARTIN and P. MARTIN, for the plaintiff in error.

COALTER, for the defendant.

By JUDGE SAFFOLD. It appears by the record as entered at the first term, only that the motion was made; no disposition of it appears. It does not appear that the Court required the security, that proof of the non-residence was made, or that the plaintiff or his attorney was in Court, or had any notice of the requisition; but an order for the dismissal was entered *nunc pro tunc*, on oral proof. The statute provides<sup>a</sup> that all suits commenced by non-residents, at any time during such non-residence, shall be dismissed, unless security be given to the clerk within sixty days after notice shall have been given to the plaintiff or his attorney, &c. A subsequent statute<sup>b</sup> extends the same right to cases, in which the plaintiff shall remove out of the State pending the suit. And another act<sup>c</sup> provides, that in case of non-resident plaintiffs, the attorney who has directed the process to issue, may, at any time, pending the suit, be ruled to give security for the costs, on motion to the Court; and if he fail, that the suit shall be dismissed, and an execution may issue against the attorney for the costs.

<sup>a</sup> Laws of Ala.  
350.

<sup>b</sup> Laws of Ala.  
456.

<sup>c</sup> Laws of Ala.  
455.

This requisition for security is understood to have been made under the authority of the first act referred to; and though the law did not require that it should be by motion to the Court, but by notice to the plaintiff or his attorney; yet as a motion in Court, in the presence of the party or his attorney, is equal to any other notice, and the Court can, at the same time, determine the fact of non-residence; and as an order requiring the security would pre-suppose the proofs made, there can be no objection to that mode of proceeding. But a mere motion on the minutes requiring the security, can avail nothing. The



JANUARY 1830.

Thompson  
v.  
Miller.

Minor's Ala.  
Rep. 17.

decision of this Court in the case of *J. & J. Read v. Carson*,<sup>a</sup> was doubtless correct; that notwithstanding an order had been made at a previous term requiring the plaintiff to give security for costs by the next term, or the suit would be dismissed, there was no error in the failure of the Court to enter the dismissal; for there it did not appear for what cause the security was required, nor that any subsequent application was made for the dismissal. So much of the reasoning employed on that occasion, as alludes to the necessity of proof of the residence of the defendant within the State, was immaterial to the result; and unless used with exclusive reference to motions against the plaintiff's attorney, is unsustained by the law.

In this case we have no hesitation in saying the order of the Court below, rendered *nunc pro tunc*, on oral testimony, was erroneous. Such orders or judgments are only authorized when predicated on matter of record, or some entry or memorandum made by or under the authority of the Court. Nor would the dismissal have been warranted unless it was satisfactorily shewn to the Court that the plaintiff was a non-resident, and that he or his attorney had received at least sixty day's notice that security for costs was required; that this suit was in the nature of an appeal from the judgment of a justice, was immaterial. The defendant had the same right to require security for costs as in any other suit pending in the Circuit or County Courts; but in either case he must pursue the directions of the Statute. The Court are unanimous in reversing the judgment, and remanding the cause.

### MAURY V. OLIVE.

2a  
134

1. Though in a common count in assumpsit, it is not necessary to state the particular goods sold, work done, &c.; yet the consideration of the indebtedness must sufficiently appear to shew it to be a simple contract debt, and not matter of record or specialty.
2. Any general words by which this would appear, are sufficient.

IN Franklin Circuit Court, J. W. Maury brought an action of assumpsit against Ira Olive. The declaration contained two counts. The first count alleged that, on, &c. at, &c. "the said defendant was justly indebted to the

JANUARY 1830

Maury  
v.  
Olive.

said plaintiff in the sum of one hundred dollars, and being so indebted, he the said defendant, on the day and year last aforesaid, undertook and promised, &c." The second count averred, that "afterwards, to wit: on the day and year last above mentioned, and in the county aforesaid, the said defendant became indebted to the said plaintiff in the further sum of one hundred dollars, which he, the said defendant, then and there undertook and promised to pay the plaintiff, and for the payment of which he assigned to the plaintiff a receipt executed to one William Bruton, by a certain Peter Martin, for the collection of a note upon one John McAfee, for the sum of one hundred dollars; and the said plaintiff avers that the said Peter Martin has not as yet collected the said amount of one hundred dollars from the said John McAfee, but the same to collect he cannot, whereby, and by force of the assignment so made as aforesaid, the said defendant became indebted to the said plaintiff in the sum of one hundred dollars, and then and there undertook and promised, &c." To the declaration there was a general demurrer by the defendant, and by the Court, at April term, 1827, the demurrer was sustained, and judgment rendered for the defendant. This is assigned for error by Maury, the plaintiff.

PETERS and McCLUNG, for the plaintiff in error.

W. B. MARTIN, contra, cited 1 Chitty's Pleading, 334-5-6-7. 13 East, 105, 116. Hardin's Reports, 225.

By JUDGE PERRY. The question presented for the consideration of this Court, is, does the declaration shew a good cause of action? We are of opinion it does not, because the plaintiff has not shewn in what respect the defendant is indebted, and although it would not be necessary in a declaration to state the particular work done, or goods sold; yet it should appear that it was not a debt of record, or specialty, but only a simple contract, and any general words by which that would appear, would be sufficient. The plaintiff, therefore, not having stated in his declaration, the consideration out of which the indebtedness of the defendant grew, the demurrer was properly sustained.<sup>a</sup>

<sup>a</sup> 1 Chitty. Pl. 337.

Judgment affirmed.

JANUARY 1830.

Stewart.  
2s 474  
98 320

## LECATT V. STEWART.

1. In an action for a "forcible detainer," it is not necessary to allege in the complaint that the defendant "entered" the premises.
2. In such action, to charge that the plaintiff has a "freehold in fee simple," is a sufficient statement of his "*estate*," in the premises.
3. The record need only shew such evidence as is offered and rejected, and such as is objected to, but admitted. Therefore, all the evidence offered is not presumed to appear.
4. This Court will not revise the decision of an inferior Court on an application for a new trial.
5. To establish possession, the plaintiff may prove a tenancy under him, and possession by his tenant.
6. In such actions, title cannot be investigated, and need not be proved.
7. The question is as to possession only.

CHARLES A. STEWART, on the 14th November, 1827, made a complaint in writing before a justice of the peace of Mobile county, against Littleton Lecatt, for a forcible detainer. The complainant alleged, "that he was possessed of a certain house and lot, and out house in the city of Mobile, &c. (describing it,) and being so possessed, that Lecatt, on the 13th November, 1827, with force and arms, and with strong hand, did, then and there forcibly detain the premises, and doth still forcibly detain the same." And further, "that the complainant hath an estate of freehold in fee simple in the premises," &c. On this complaint, the justice issued his warrant and venire, and the cause was tried on the plea of not guilty, and a verdict was found for the plaintiff, and judgment thereupon given. A motion was made by the defendant for a new trial, but was overruled. He afterwards obtained a certiorari, and removed the record into the Circuit Court, where the judgment of the justice was affirmed; and from the judgment of the Circuit Court, he brought the case by appeal to this Court, and here assigned errors. Several points were ruled on the trial by the magistrate, and various errors were assigned, which need not be here stated, as they are recited in the opinion delivered.

SALLE, for the appellant, cited 3 Burrows, 1732, 1702. 4 Johnson's Reports, 150. 13 Johnson's 340, 1 Caine's Reports, 124. 2 Caine's Reports, 98. 2 Burn's Justice, 177.

GORDON & HALL, contra.

By JUDGE TAYLOR. It is to reverse the decision of the Circuit Court, that the appeal is brought to this Court.

JANUARY 1830

Lecatt  
v.  
Stewart.

The first error assigned, is, that the plaintiff does not state that the said Littleton "entered" the said premises.

The 7th section of the "act concerning forcible entries and detainers," prescribes the manner in which the complaint shall be made, and what it shall contain, and declares that it shall be in writing, "specifying the lands, tenements, or other possessions, so forcibly entered upon and detained, or forcibly or unlawfully detained, by whom and when done, and the estate therein," &c. The plaintiff in this instance states, that on the 13th of November, 1827, the said Littleton Lecatt, "with force and arms and strong hand, did, then and there forcibly detain" the premises, which in the plaintiff are described, and which the complainant had previously therein alleged himself to have been in the possession of. As the injury alleged was a "forcible detainer," and not a "forcible entry," it is believed that this assignment contains no cause for a reversal.

The second assignment is, "that the plaintiff does not state that the said Charles A. Stewart was seized in fee, and being so seized, that the said Littleton "entered," &c. The statute requires that the complainant shall state his "estate" in the lands, &c. In this instance the plaintiff does state that he has "a freehold in fee simple." This is all that it is necessary for it to contain in this particular.

The third and fourth assignments relate to the absence of all evidence of force before the justice of the peace. In this Court it does not appear whether such evidence was introduced or not. In reasons assigned by the defendant's counsel for the new trial, which he moved for before the justice, it is alleged that there was no evidence of force; but this Court is not authorized to act upon this statement of counsel, for it is nothing more. In the case of *Ward v. Lewis*,<sup>a</sup> it was determined by this Court, that no evidence need appear in the record, except that which is offered, but rejected, and that which is objected to, and yet admitted by the justice. Such evidence as that required by these assignments, may have been introduced and not transcribed upon the record.

<sup>a</sup> 1 Stew. Rep  
page 26.

The 5th assignment is, that the justice erred "in not granting a new trial of the issue, when the jury found the defendant guilty, in the total absence of all evidence of force or menaces." It has often been decided by this

JANUARY 1830.

Lecatt  
v.  
Stewart.

---

Court that it will not revise the decisions of inferior tribunals, on motions for new trials. These motions being addressed to the sound discretion of the Court, must abide its determination. But were we willing to make this case an exception, which we are not, we have no data upon which to determine that the decision of the magistrate was in that instance incorrect.

The 6th assignment is, that the justice erred "in admitting the lease to be read in evidence to prove possession without the aid of other evidence of that fact." It appears from the record that the complainant offered in evidence a paper, termed in the record a lease, executed by Martha J. Livingston, in which it is recited that the complainant had rented to the said Martha the premises in dispute, for the term of one year from the date thereof, which is the 19th October, 1826, and she promises to pay twenty-five dollars rent therefor, and "return the premises in as good order as received" by her. The introduction of this lease was objected to, but admitted by the justice. This paper must have been offered as testimony conducing to prove that Stewart had been in possession of the premises by his tenant; for it will be observed that the proceedings in this case commenced within a month after the time at which the term of Mrs Livingston expired. If this was all the evidence which was introduced to prove that Stewart had ever been in possession of the premises, it was certainly insufficient to establish that fact; but this is nowhere stated to be the case. The presumption must be, that other evidence was introduced to prove that Mrs Livingston had occupied the premises, and the object of reading this paper was, to show that she held that possession as the tenant of Stewart. For this purpose it certainly was legally admitted. The possession of the tenant is the possession of the landlord; and as the tenant herself would have been estopped by her own deed from denying this fact, so that deed, when coupled with evidence of her possession during the time specified in it, was admissible in this case to show that such possession was the possession of Stewart.

The 7th assignment is, that the justice erred in "charging the jury that it was not necessary for the complainant to prove any title in him." In a proceeding of this kind, the title is not in controversy; it is only necessary to prove that the possession has been intruded upon by the defendant, and it is then for the defendant to shew that he holds

that possession in a manner which affords him a defence in that summary proceeding.

The judgment must be affirmed, and in this opinion the Court are unanimous.

JANUARY 1830.

Lecatt  
v.  
Stewart.

### PERKINS V. HARPER.

Where the Court refuses to sign a bill of exceptions, and the party wishes to establish the exceptions by proof, under the statute, it must be done within the trial term, and on notice to the opposite party.

THIS was an action tried in Franklin Circuit Court, in which Harper was plaintiff, and Perkins was defendant. At March term, 1828, the cause was determined, and judgment was rendered for the plaintiff, for \$720 26 debt, and \$26 82 damages.

The record recites that, at the trial, the defendant's counsel tendered a bill of exceptions, which the Court refused to seal; and thereupon that the presiding Judge drew up and filed a bill of exceptions, and ordered it to be made a part of the record, which bill of exceptions is set out. The record recites that afterwards, on the 7th of May, the defendant filed the bill of exceptions which had been rejected, and also three affidavits to establish its truth. The matter of those several bills, and the errors thereupon assigned, it is unnecessary to notice.

COALTER, for the plaintiff in error.

ORMOND, for the defendant.

By JUDGE SAFFOLD. In this case a preliminary question arises, which is decisive of the cause. On the trial in the Circuit Court, the plaintiff in error being the original defendant, tendered a bill of exceptions, which was refused by the presiding Judge, but who signed a different one, containing, as he said, the truth of the facts, but which was not satisfactory to the defendant. Two months subsequent to the term at which these proceedings were had, the defendant proceeded, under the authority of the statute, to establish his exceptions by affidavits, and without notice to the adverse party. The difference in

JANUARY 1830.

Perkins  
v.  
Harper.

the legal effect of the exceptions, is not considered material, except as relates to the terms on which the parties consented to have the judgment by default opened. The bill, as allowed by the Judge, states the consent to have been "that the defendant should plead to the merits of the action, and go to trial," and that he afterwards contended for the right to plead in abatement, which the Court refused to permit. The exceptions which he attempts otherwise to establish, state the consent to have been, "that the defendant should plead to issue," as the terms on which the default was opened.

Therefore, without scrutinizing the effect of the agreement, regarded in either form, it is deemed sufficient to say, the exceptions claimed by the defendant were not taken in due time, or in the proper manner; that instead of the delay of two months, and *ex parte* affidavits, the only correct and safe rule, is, that the party claiming exceptions which the Court refuses to allow, shall proceed during the term at which they are rejected, and within a reasonable time after the trial, to make proof of the exceptions in the form precisely in which the bill has been refused by the Judge, and after due notice to the adverse party, or his attorney, of the time and place of taking the proof. The language of the statute, is, that in such cases, "it shall and may be lawful for the Supreme Court to receive such evidence of the exceptions as may be satisfactory to it." The Court must be satisfied of the truth of the exceptions taken. It may be a matter of the utmost importance, and *ex parte* statements can never be so satisfactory in the decision of essential rights, as proofs which the adversary has had an opportunity to contest. The points constituting exceptions are often so intricate, that delay would be productive of uncertainty and mistake.

The only material assignments of error being predicated on these latter exceptions, and they not having been regularly proven, the judgment must be affirmed.\*

---

\*See the case of the Tombecbe Bank v. Malone, 1 Stewart's Reports, page 269.

JANUARY 1839

## MCGOWEN V. GARRARD and MORGAN:

Where a party, with a full knowledge of the alleged fraudulent circumstances, recognizes or confirms a contract made in his name by an agent, he cannot afterwards set up the fraud or want of authority in that agent.

THIS was an action of debt brought in Lauderdale County Court, by J. McGowen as assignee, against W. W. Garrard and John Morgan, to recover on a sealed instrument made by them, and one J. Willis, in 1818, for the payment of \$164 14, to G. Price, by said Price indorsed to one F. P. Pennington, and by Pennington to the plaintiff. The declaration was in the usual form. The defendant pleaded two pleas. The first was a general plea of fraud. The second was a special plea, alleging that Price, the payee, Pennington, the first indorser, and Willis, the joint maker, who was not sued, combined and confederated to defraud the defendants; that in pursuance of said combination, Willis, without the knowledge or consent of the defendants, borrowed or pretended to borrow of Price, money in the names of the defendants Garrard and Morgan, representing that it was for their use and benefit, and executed an obligation in the names of Morgan and Garrard to Price; that Willis had no authority to borrow nor to execute the note for the defendants, and that the money never came to their hands or use. It is further alleged that Price threatened to harass and oppress the defendants if they would not pay the amount, and that Pennington (in whose integrity and legal knowledge they had great confidence,) assured them they were bound to pay the amount, and advised them to settle it rather than be harassed by Price; and believing the assertions and advice of Pennington, they gave in lieu of the original note the obligation now sued on, with Willis as their security, on Price's agreeing to give time till the 15th June, for payment: wherefore, they say the writing sued on was obtained by fraud, covin and misrepresentation, and without valuable consideration. To these two pleas, the plaintiff demurred, and the Court sustained the demurrer as to the first plea, but overruled it as to the second. The plaintiff declining to reply to the second plea, judgment was given for the defendant. This decision of the Court on the demurrer to the second plea is here assigned for error by the plaintiff.



JANUARY 1830.

McGowen  
v.  
Garrard and  
Morgan.

W. B. and P. MARTIN, for the plaintiff.

COALTER, for the defendants.

By JUDGE PERRY. We are by the demurrer brought to the consideration of the sufficiency of the facts of the second plea to bar the plaintiff of his recovery. The defendants, by executing with Willis the writing obligatory sued on, waived all their right to question the illegality of the first transaction; for it was competent for them to recognise the contract made by Willis, and thereby make themselves liable with him, although they might not have been liable in the first instance. This they did do, by entering into the bond sued on. But the defendants endeavor to avoid their responsibility by alleging that they were threatened to be harrassed, and that Pennington advised them that they would have the notes first executed by Willis to pay, and that to avoid being harrassed, they substituted the note in question. They shew no want of knowledge as to the facts on their part, and having executed the note with a full knowledge of all the facts, they are bound by it. The plea does not shew a state of fact sufficient to warrant the conclusion that a fraud has been practised upon the defendants; consequently it is no bar to the action. We are therefore of opinion that the judgment of the Court below must be reversed, and judgment rendered here for the plaintiff.

### SPANN V. BOYD.

1. In appeals from justices, technical nicety and formal declarations are not required.
2. An omission to state the term of the Court in the title of the declaration, is not fatal on general demurrer.
3. By the statute, justices of the peace have jurisdiction of all demands in form *ex contractu*; therefore they have jurisdiction for the recovery of the value of specific articles bailed, and not re-delivered according to promise.
4. Where there are good and bad counts in a declaration, on general demurrer to the whole, judgment must be given for the plaintiff.

SPANN recovered a judgment before a justice of the peace of Marengo county, against Boyd. Boyd, by certiorari, removed the cause into the Circuit Court, and

there, the plaintiff filed his statement of the cause of action, or declaration, in two counts. The first count alleged, that in consideration that the plaintiff had delivered to the defendant certain goods and chattels, of the value of \$49, to be taken care of by the defendant for the plaintiff, the defendant undertook to take care of the goods for the plaintiff, and to deliver them to him whenever thereunto requested, &c.; that the plaintiff demanded the goods, and that the defendant did not deliver them, but on the contrary, that he had so negligently conducted himself respecting them, that they were wholly lost to the plaintiff. The second count was for goods sold and delivered, money had and received, laid out and expended, and an account stated in the usual form. The declaration was not entitled as of any particular term of the Court. The defendant filed a general demurrer to the whole declaration, which the Court sustained, and at May term, 1828, gave judgment for the defendant.

JANUARY 1829.

Spain  
v.  
Boyd.

BARTON & STEWART, for the plaintiff. The demurrer should have been overruled; because both counts were good. The first was on a special bailment, and *express* promise to re-deliver, therefore on contract. Besides, a party may waive tort and bring *assumpsit*. The statute <sup>a</sup> authorizes an action before a justice, for specific articles. But if the first count was not good, the second one clearly was. It is a copy of the mixed count to be found in Chitty's forms; and where there are several counts, and one is good, the defendant should demur to the bad ones only; if he demurs generally, the demurrer must be overruled.<sup>b</sup> It should be overruled also, because there was a good cause of action in the declaration, and in appeals from justices courts, technical strictness is not required.<sup>c</sup> The omission to fill the blank in the declaration as to the term of the Court, would not be error. It clearly appears from the record that the declaration was filed after the appeal came up, and before judgment rendered on it; in appeals, this is sufficient, at all events it was only a matter of special demurrer.<sup>d</sup>

<sup>a</sup> Laws of Ala. 510.

<sup>b</sup> Tidd's Pr. 647. 1 Sann. 286. 2 Sann. 380. 1 Wilson, 248. 4 Bos. & Pul. 43. 6 East. 333. 3 Caines Rep. 89, 263. 1 Henn. and Munf. 361.

<sup>c</sup> Stat. of 1825. Laws of Ala. 189, 511.

<sup>d</sup> Laws of Ala. 511.

CHAPMAN, contra. We admit that to sustain the demurrer, we must shew defects going to the whole declaration, and not to one count merely. But there are objections going to the whole. The title of the term is not set out; this is fatal on general demurrer.<sup>e</sup> Again, this case

<sup>e</sup> 1 Chitt. Pl. 267.

JANUARY 1836.

Spann  
v.  
Boyd.

a 1 Chitt. Pl.  
325.  
b 2 Saun. 210.  
1 Chitt. Pl.  
197.

c 1 Chitt. Pl.  
157.

was brought from a justices Court. The statute does not give to justices jurisdiction of such a cause of action as is stated in the first count; therefore the demurrer was proper. If the plaintiff demands two things or more, and from his own shewing, there is a better writ for one of them, the whole writ shall abate.<sup>a</sup> Formerly it was necessary to plead such a defence in abatement, but now, if the objection appear in the declaration, the defendant may demur.<sup>b</sup> Here the objection does appear on the face of the proceedings. The declaration is also bad for a misjoinder of counts. Besides the objection, that the justice could have no jurisdiction of the subject matter of the first count, the counts are for separate and distinct demands, which could not, in any event, be joined; and as this appears on the record, it is demurrable.<sup>c</sup>

By JUDGE PERRY. The practice has never required formal declarations in cases originating before justices of the peace; a mere statement of the grounds of action has always been held sufficient, under the statute regulating the manner of making issues in the County and Circuit Courts, preparatory to the trial of cases of appeal, and certiorari. Technical niceties have been avoided, and held unnecessary. The omission to state the term of the Court in the title of the declaration, was no cause of general demurrer. It is however contended in support of the demurrer, that there is a misjoinder of counts, inasmuch as the first count describes a cause of action not cognizable before a justice of the peace. The chief difficulty, therefore, arises in applying the cause of action, as stated in the first count of the plaintiff's declaration, to the act of the Legislature defining the jurisdiction of justices of the peace. The act prescribes "that all debts and demands not exceeding fifty dollars, for a sum or balance due on any specialty, note, bond, cotton receipt, contract or agreement in writing, or for goods, wares and merchandise sold and delivered, or for work, or labor done, or for money lent, or for specific articles, or for any sum or balance due, either by written or verbal contract, or assumpsit, in any case not sounding in damages merely," are declared to be exclusively cognizable and determinable by a justice of the quorum, or of the peace.

From the provisions of the foregoing act, it seems to have been the intention of its makers to exclude from the jurisdiction of justices of the peace, all actions which are in form *ex delicto*; because in that form of action, damages are recovered for the tort or injury to the person, un-

connected with contract. The inquiry, therefore is presented, whether the count in question is in form *ex contractu*, or *ex delicto*? By a reference to 2 Chitty's Pleadings, "it will be found that the precedent there given in assumpsit against bailees, corresponds with the one now in question in most of its parts; consequently it has the character of a count in assumpsit against a bailee, founded upon contract, the breach of which constituted the injury to the plaintiff, and the extent of which is to be ascertained by the justice of the peace, by fixing the value on the specific articles which the bailee failed to deliver, or which were damaged, or destroyed by his negligence. The count, however, is bad, in not specifying the articles which were delivered to the bailee, if I may so call the defendant, and which were to be re-delivered to the plaintiff; conceding therefore, that the first count is bad, and would have been so considered on general demurrer; yet the demurrer should not have been sustained, there being no misjoinder of counts, all being upon contract, and all good, except the first; for it is a well settled rule, that if there be several counts in a declaration, some of which are sufficient, and others not, the defendant should only demur to the bad counts; and if he demur to the whole declaration, the judgment must be against him.<sup>b</sup>

It is the opinion of the Court, that the judgment given below ought to be reversed, and the cause remanded. This decision, however, is expressed as being that of the Court, only on the question of misjoinder, and the reversal is predicated on that point alone. The remainder of this opinion contains my own views, and those of Judge Crenshaw on the facts presented by the record.

Reversed and remanded.

JUDGE SAFFOLD not sitting.

JANUARY 1839.

Spann  
v.  
Boyd.

a 2 Chitt. Pj.  
page 104.

b 1 Chitt. M.  
643.

#### OLIVER v. JUDGE.

In the record, there appeared a writ, and a verdict and judgment for the plaintiff; the clerk certified that at the trial, the reading of the declaration was waived, and that afterwards it could not be found; no declaration, plea nor issue appeared in the transcript; held that the judgment was erroneous.

THIS was a writ of error from the Circuit Court of the

JANUARY 1880.

Oliver  
v.  
Judge.

County of Butler, sued to this Court by A. Oliver, to reverse a judgment obtained against him by Mary H. Judge. In the record as certified by the clerk, there appeared a writ in case, in the name of Mary Judge, plaintiff, against Oliver, as defendant, indorsed to recover damages for the breach of a marriage promise, and for seduction. Then follows in the record a recital; that at March term, 1828, the parties came by their attorneys, and also a jury, who being duly elected, tried and sworn to try the issue joined; &c. found a verdict for the plaintiff for \$541 damages, for which she had judgment. This comprises the whole record; no declaration or plea appearing. Annexed to the record, however, was a certificate by the clerk of the Court, under his hand and seal, and directed to the Judges of the Supreme Court, certifying that there was no declaration in his office, and had not been since the trial; that when the trial commenced, the plaintiff's attorney inquired of the attorney for the defendant, if he should read the declaration? the reply was, that it was not necessary; the plaintiff's counsel then laid it on the table, and proceeded with the trial; that at the conclusion of the trial, the jury asked to be furnished with the declaration, but it could not be found, and they were directed by the Court to proceed without it, which they did. He further certifies that he has made diligent search, and has never been able since to find it.

PARSONS & COOPER, of counsel for Oliver, the plaintiff in this Court, assigned for error, that the record contained no issue, no pleadings, no cause of action, and nothing on which to found a verdict and judgment.

GOLDTHWAITE, for the defendant in error.

By JUDGE COLLIER. The clerk, in his certificate, states the circumstances, and says that he was unable to find the declaration in the cause to furnish to the jury, and that after diligent search, he is still unable to find it. In this certificate, the clerk does not inform us whether there was an issue for the jury to try, or with certainty, whether there was a declaration.

This case does not render it necessary for us to decide whether a judgment should be reversed for the absence of a material part of the record, which was lost after judgment. If such a case was presented, we should hesitate

long before we would refuse effect to the certificate of the proper officer, giving that information. Here, the declaration, if there ever was one, (a fact which does not satisfactorily appear,) was lost before judgment, and could have been supplied on application to the Court, by leave to substitute another. Again; it does not appear that there was any issue for the jury. This irregularity, independent of the absence of a declaration, would be a sufficient cause to reverse.<sup>a</sup> The judgment is therefore reversed, and the cause remanded.

JANUARY 1836.

Oliver  
v.  
Judge.

<sup>a</sup> Minor's Ala.  
Rep. 137.

### WATKINS v. WATKINS, use of PERKINS.

A. brought suit on a note for the use of B. under the statute, C. the defendant, offered to prove by his own oath that the note was made and given to A. for an usurious consideration, and that it was made by the advice of B. and with his knowledge, to evade the usury laws. B. denied on oath any usury, so far as he was concerned, or knowledge of the usury. It was held that this was not a sufficient denial of the usury to prevent C. from testifying.

THIS was an action tried in Bibb County Court, which had originated before a justice of the peace. Jesse Watkins, for the use of William Perkins, was plaintiff, and Peter Watkins, was defendant. The action was on a promissory note for \$50, made by Peter Watkins, and payable to Jesse Watkins. The defence was usury. At the trial, the defendant offered a statement, under the statute, and proposed to prove it by his own oath, to support his plea. The statement was, that "the note sued on, and also another, amounting together to \$75, was given by him to Jesse Watkins, the payee, to raise the sum of \$40; which fact was known to the plaintiff, Perkins, at and before the making of the notes; and that they were made by his advice and direction, to evade the laws against usury." To this statement, the plaintiff, Perkins, filed his affidavit; he "denied that he knew that the two notes were given to Jesse Watkins, to raise the sum of \$40, either before or at the time of making them," and "denied advising or directing the making of the notes to evade the laws against usury, or any knowledge of their consideration being usurious, but that so far as he was concerned in the transac-

JANUARY 1830.

Watkins

v.  
Watkins.

tion, they were fair and *bona fide* contracts." The Court held the denial to be sufficient, under the statute to prevent the defendant from giving evidence on his own oath, and rejected him, to which the defendant excepted. The jury found for the plaintiff.

MARDIS, for the plaintiff in error, insisted that the denial was insufficient, and that the defendant below should have been permitted to prove the usury on his own oath.

CLARKE, for the defendant in error.

By JUDGE WHITE. Were it not that it might be deemed of some importance more extensively to make known the views of this Court, on a point of practice often occurring on the circuits, I should consider it unnecessary to file a written opinion in this case, as the only question raised by the assignment of errors, is embraced by previous adjudications.

It has been the general policy of civilized and commercial nations, to fix a certain rate of interest for the loan or use of money; and as this regulation has been considered of vital importance to society, to enforce the observance of the laws on the subject by penal sanctions, or threatened losses. But the facility with which contracts can be made, importing on their face a fair consideration, puts it in the power of the usurer to evade the prohibitions of the law, if the contracts were subjected to none but the ordinary rules of evidence. Hence the necessity of the provision in our statute, that the borrower should be a witness to prove the usurious consideration of notes, bonds, &c. This, however, being a variation from the general principle, wholesome in itself, that no person shall testify in his own case, it became necessary to place it under certain restrictions, and not to allow the borrower to give testimony, "if the person against whom such evidence is offered to be given, will deny upon oath, to be administered in open Court, the truth of what such witness offers to prove against him." Now, to apply these express provisions of the statute to this case, neither the nominal nor beneficial plaintiff denied on oath the only material fact, which the defendant offered to prove against them; but the person for whose use the suit was brought, merely denied his knowledge of the facts stated. To permit such a denial as this to exclude the evidence of the borrower, would not only

be contrary to the plain words of the statute, but in many cases would tend to defeat the very object of the law itself. For whenever the usurer should take a note or bond for the sum claimed, and transfer it to a third person, ignorant of the consideration, that person could safely swear that he did not know the contract was tainted with usury, and thereby deprive the defendant of his oath, which is often the only method of proving the facts in avoidance. This, however, the statute evidently intended to prevent. But as already intimated, this very question was decided by this Court, at the July term, 1827.

JANUARY 1830.

Watkins  
v.  
Watkins.

We are therefore of opinion, that there is error, that the judgment must be reversed, and the cause remanded. \*

### KING v. DOUGHERTY.

Where more than \$50 is due on a contract, the creditor may relinquish all over that amount, and sue for \$50 in a justice's Court.

E. KING held a note made by J. Dougherty, payable to him for \$51 64, due on the 4th of February, 1827. On the 14th of March, 1827, King indorsed on the note the following words: "I relinquish all the within note that is over fifty dollars, E. King," and on the same day sued out a warrant before a justice of the peace of Shelby county, against Dougherty, returnable on the 24th of March; to recover on the note. The magistrate gave judgment against the defendant for \$50, besides costs. Dougherty appealed to the County Court of Shelby county, which Court, on his motion, quashed the proceedings. From this judgment, King appealed to the Circuit Court of Shelby county, where, at the November term, 1827, the judgment of the County Court was affirmed. This decision of the Circuit Court, is now here assigned for error.

MARDIS, for the plaintiff in error, submitted the cause, no counsel appearing for the defendant in error.

\* See the case of *Farris & Powell v. King*, 1 Stewart's Reports, 255.



JANUARY 1830.

King  
v.  
Dougherty.

By JUDGE CRENSHAW. The question arising from the record, is, had the plaintiff a right to relinquish all his debt except fifty dollars, so as to bring the case within the jurisdiction of the magistrate? This question has been settled in the affirmative by a former adjudication of this Court. The judgment must therefore be reversed, and the proper judgment rendered here. In this opinion the Court are unanimous.

JUDGE SARFOLD not sitting.

### AVENT V. READ.

2a 488  
181 601

1. A conveyance of lands, though not duly registered, if made *bona fide*, and for valuable and sufficient consideration, is good against creditors.
2. Such deed is also good against a purchaser at sheriff's sale, who has notice.

THIS was an action of *trespass to try titles*, brought in 1822, by John Read, in Madison Circuit Court, against Henry Avent, to recover possession of a quarter section of land, and damages for the detention of it. The cause was tried at the October term, 1827, of the Court, on the plea of not guilty. It appeared in evidence, that in March, 1820, one Gray had obtained a judgment against Avent; the land in dispute was levied on by the sheriff on an execution under this judgment, in March, and sold in September, in the same year, as Avent's property, when Read became the purchaser. The defendant proved and read in evidence a deed executed by himself to one James Gaston, on the 20th of February, 1820, for the same land; which was recorded on the 28th of August following, more than six months after its date. This deed was made during the pendency of the suit against Avent. At the time of the sheriff's sale, Gaston gave notice that the land had been sold to him by the defendant, and that he was the owner of it. The Court, on this proof, instructed the jury that the failure of Gaston to prove and record his deed within the time prescribed by law, rendered it void and fraudulent as against Read, the purchaser at the sheriff's sale, although the consideration of the deed might have been *bona fide* paid; and though it might have been executed in good faith. To which the defendant excepted. The jury

found for the plaintiff the land, and \$5 damages. The instructions given by the Court to the jury, are here assigned for error by *Avent*.

JANUARY 1830  
Avent  
v.  
Reed.

CLAY & McCLUNG, for the plaintiff in error.

HOPKINS, for the defendant.

By JUDGE COLLIER. The material inquiry, is, whether the registration of a deed conveying lands, be necessary to give to it validity against the creditors of the vendor. The negative of this inquiry is attempted to be sustained, by a reference to the second member of the second section of the statute of frauds, "so much of which as it is important to notice, is in these words: "And moreover, if any conveyance be of goods and chattels, and be not on consideration deemed valuable in the law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing, acknowledged or proved. If the same deed include lands, also, in such manner as conveyances of lands are by law directed to be acknowledged or proved; or if it be of goods and chattels only, then acknowledged or proved by one or more witnesses in the Superior or County Court, wherein one of the parties lives; within twelve months after the execution thereof." This provision of the act, it is conceived, can have no influence upon the question; it is expressly restricted to deeds which are made without a valuable consideration; and in such cases only to those conveying goods and chattels, or goods and chattels and lands, and not to those which convey lands alone. Did this construction admit of a doubt, that doubt would be entirely removed by the third section of the same statute, which declares that it shall not extend to any estate in lands, which shall be upon good consideration, *bona fide*, lawfully conveyed.

§ Laws of Ala.  
244.

The act of 1811, <sup>b</sup> only restrains the operation of deeds of land, for a failure to have them registered, against subsequent and *bona fide* purchasers, and mortgagees without notice, without saying any thing of creditors. In fact, in the multiplicity of legislation upon this subject, anterior to the date of the deed in question, registration by the vendee seems not to have been made necessary to give title as against the vendor's creditors. We are therefore of opinion that the creditor derives no advantage from the

§ Laws of Ala.  
245.

JANUARY 1830.

Avent  
v.  
Read.

omission of the vendee of his debtor to register such a deed. We may consider the defendant as standing in the situation of Gray, the judgment creditor, or as a purchaser from the time he became such; and in either point of view the charge of the Court was erroneous. It should have been left to the jury to determine from the proof offered, whether the defendant, at the time of his purchase, had notice of the existence of the deed. Their inquiry on this point was foreclosed by the instruction given. If the proof professed to be set out in the bill of exceptions, could be considered as all that was offered, we would be prepared to affirm the judgment below, because no consideration appears for the conveyance from the plaintiff to Gaston; but there is nothing in the record which enables us to infer that other evidence was not adduced, and the language employed in the charge of the Court authorizes a different conclusion.

We are accordingly of opinion, that the judgment must be reversed, and the cause remanded.

JUDGE WHITE not sitting.

2s 490/  
111 118

#### JOHNSON V. KELLY & HUTCHISON.

1. If the judgment is for more damages than laid in the writ and declaration, it is error.
2. An admission by the defendant of the correctness of the plaintiff's demand, is sufficient evidence to recover, without proof of the original entries, or production of the account.

KELLY & Hutchison, for the use of Wm. Leach, on 23d of April, 1827, commenced an action of *assumpsit* against W. B. Johnson, in Madison Circuit Court, to recover on an open account for services rendered. The damages were laid in the writ and declaration at \$100. The plaintiffs proved on the trial, that the account, amounting to \$90, was presented on behalf of Leach, by one Rogers, to the defendant, who admitted it to be correct, and agreed that if day was given from that time, the 31st May, 1827, till the 1st of January next afterwards, he would give his note for the amount, with G. W. Johnson as security; Rogers surrendered and receipted the account, and took a note for the amount, payable to Leach,

JANUARY 1830

Johnson  
v.  
Kelly and  
Hutchison.

which was signed by W. B. Johnson, and was to be obligatory, when signed by E. W. Johnson; but when presented to him, he refused to sign it. The note was produced at the trial by the plaintiffs, who tendered it to be cancelled. At the time Rogers presented the account, Johnson remarked, that for some of the charges, the services were not fully rendered, but admitted the correctness of the charges, and did not say any of them were not due and payable. There was no evidence that the services charged were not rendered before the suit was brought, but there was further proof of an acknowledgment of the correctness of the account at another time by the defendant, and a promise by him to settle the amount of it with Leach. The defendant objected that no account was produced. The plaintiffs offered to produce the book of original entries of the charges, but the Court determined that neither the account nor book was necessary. The defendant also moved the Court to instruct the jury as in case of nonsuit, because, as he insisted, the giving of the note extinguished the right to sue on the account. This instruction the Court refused. To all which the defendant excepted. The jury found a verdict for \$108; for which judgment was given.

BRANDON, for Johnson, the plaintiff in error, contended that the receipted account should have been produced or accounted for, and notice given to produce it, if in the possession of the opposite party.<sup>a</sup> Also, that the plaintiff should have been compelled to exhibit or name the items of the account on which the suit was brought, so that the defendant could have cross-examined as to them, and so that it could be ascertained that they were the same which were acknowledged to be due.<sup>b</sup> He also insisted that the judgment should be reversed, because the verdict and judgment were for more damages than were laid in the writ and declaration.<sup>c</sup>

GAYLE contra.

*Per curiam.* In this case the judgment is reversed, because the verdict and judgment are for more damages than are laid in the writ and declaration. On the other errors assigned, our opinion is in favor of the defendants in error.

Reversed and remanded.

<sup>a</sup> 1 Stark. Ev. 327 to 390.  
<sup>b</sup> 1 John. Dig. 576.

<sup>c</sup> 2 Tidd's Pr. 927. 2 Blk. Rep. 1300. 1 Marshall's Rep. 475-7. 1 Chitt. Pl. 400. 1 Maule & Sewl. 675. 4 Ib. 94. 5 East. 142.

JANUARY 1830.  


## HEFFLIN V. McMINN.

1. A sheriff may be permitted even after judgment, to amend his return on a writ *nunc pro tunc*, so as to show that the writ was executed in fact on the defendant.
2. And such return *nunc pro tunc*, will be sufficient to sustain a judgment, though made after writ of error.

THIS was a writ of error from Pickens Circuit Court, sued by Hefflin to reverse a judgment rendered in that Court against him by McMinn. The action was debt, to recover on a promissory note. In the record there appeared a writ and declaration, and at the regular trial term, on the first of October, 1828, a judgment by default for \$88 60, the amount of the note, and \$10 50 damages. The writ of error was sued out to reverse this judgment, on the 16th of October, 1828. At that time it did not appear of record that the writ had been executed by the sheriff. At March term, 1829, the plaintiff below filed in the Circuit Court an affidavit made by H. White, the deputy sheriff of Pickens county, who deposed, that on the 18th of March, 1828, he did execute the writ on Hefflin, by delivering him a copy; that he returned the writ several days before the return term, but that through inadvertence, and in the hurry of his official duties, he omitted to indorse the service on it. On this affidavit, the Circuit Court, at that term, gave leave to the Sheriff to amend his return, by indorsing the service of the process *nunc pro tunc*, which he accordingly did, whereby the return now reads as follows: "came to hand 18th March, 1828, Thomas Davis, sheriff, by his deputy, H. White. May 16th, 1829. Executed on the within named defendant, by delivering him a true copy on the 18th of March, 1828. This return now made, *nunc pro tunc*, by leave of the Court, as from press of business, it was omitted at the proper time. Thomas Davis, sheriff of Pickens county, by his deputy, H. White."

SHORTBRIDGE and FLOURNOY, on behalf of Hefflin, assigned for error, and contended that the judgment by default was erroneous, inasmuch as the record did not shew the writ to have been executed when it was taken. That the Court erred in permitting the return to be amended *nunc pro tunc*, and that the amended return was void, be-

cause there was nothing in the record to amend by; and that the amended return was ineffectual, because made after writ of error brought.

JANUARY 1886.

Hesslin  
v.  
McMinn.

KELLY, contra.

By JUDGE WHITE. It is insisted that the amendment made in the sheriff's return by leave of the Circuit Court, cannot cure the defect in the judgment so as to prevent a reversal. We are, however, of a different opinion. Courts have extended great latitude to ministerial officers, in permitting them to amend their returns, so as to conform to the facts of the case. This prevents injury from casual mistakes, in which the parties have no agency, and by which they should not be prejudiced. But completely to effectuate this purpose, it is necessary that the return, when amended, should relate back to the period at which it was to have been made. In the present case, the plaintiff in error knew at the time he sued out his writ of error to reverse the judgment, that the original process had been served upon him; he had all the advantage of notice from such service; and to permit him to reverse for the clerical mistake of the Sheriff, would be to allow him to convert that which did not affect his rights into a means of injustice to the opposite party, who had nothing to do with the omission complained of.

Judgment affirmed.

#### HOWARD v. JACKSON.

Parol evidence is insufficient to support an action for the purchase money, on a contract for the sale of lands.

HOWARD declared in assumpsit against JACKSON, in Wilcox Circuit Court, to recover the price of a lot in the town of Cahawba, used as a brick yard, and also a quantity of unburnt bricks, sold by him to JACKSON. To sustain the action, the plaintiff introduced the evidence of one W. W. Gary, who testified that he had heard the defendant say he had bought the lot and brick yard, which then had about 4,000 brick in it, for which he agreed to give 60,000 brick in payment; that JACKSON had occupied the yard after the

JANUARY 1830.

Howard  
v.  
Jackson.

<sup>a</sup> Statute of  
frauds, Laws  
of Ala. p. 244  
Rinaldi v.  
Rives. 1  
Stew. Rep.  
174.

purchase, and had delivered 6,000 in part payment, to Howard's order; and that brick were worth \$10 per thousand, &c. The Court instructed the jury that on this evidence the plaintiff could not recover, because parol evidence was inadmissible to establish the contract as to the land; and that as to the raw brick, the amount was not within the jurisdiction of the Court. The jury found for the defendant. The plaintiff excepted, and assigns this instruction for error.

H. G. PERRY, for the plaintiff in error.

THORINGTON, contra.<sup>a</sup>

By THE COURT. We are of opinion that the instructions given by the presiding Judge were correct, for the reasons given, and that the judgment must be affirmed. In this opinion we are unanimous.

### THOMPSON V. SAFFOLD et al.

1. In an action against two on a contract, (not being within the statute of 1818,) a discontinuance as to one who is returned "not found," is a discontinuance as to all.
2. A certificate of a purchase of a lot of land, entitling the purchaser to a title on payment of the purchase money is not within said statute.
3. Such discontinuance is good cause of demurrer.

THIS was an action of trespass on the case commenced by A. M. B. Thompson, in Dallas Circuit Court, against James Saffold and Reuben Saffold, as survivors of P. Harrison, J. Cox, L. Wood, J. Phillips, and D. Files, deceased, who composed the "Portland Town Company," to recover damages of them, for failing to make title to a lot. The writ was executed on James Saffold, and as to Reuben Saffold, it was returned "not found." The plaintiff filed his declaration against James Saffold, (discontinuing his action as to Reuben Saffold,) stating that the persons above named, under the name of the "Portland Town Company," on the 23d of August, 1819, by John Cox, their treasurer, made and delivered to one Frederick Shef-

field, a certificate, by which it was certified that said Sheffield had purchased of said company a lot in Portland, for \$36; one fourth of which was paid down according to contract, and that if the remaining three fourths were paid at certain specified periods to one of the proprietors of said land, that then, said Sheffield, his assigns or legal representatives, should be entitled to receive from the proprietors a deed in fee simple for the lot, under the penalty of \$72. The plaintiff avers that the payments were made according to contract, and that afterwards, on the 8th of July, 1820, Sheffield assigned the certificate to one Bradley Dear, and that he afterwards, in 1822, assigned it to the plaintiff. The declaration further states, that the plaintiff put improvements on the lot to the amount of \$3,000, and that the defendants had no title deed to the land, but that the title to it was in another person, and that that they were wholly unable to give a title to the plaintiff for the lot; whereby he has sustained great damages, &c. To this declaration, the defendant demurred, and at October term, 1828, judgment was thereupon given for the defendant. This judgment on the demurrer is assigned for error.

JANUARY 1829

Thompson  
v.  
Saffold et al.

R. G. GORDON, for the plaintiff in error.

H. G. PERRY, for the defendant.

By JUDGE WHITE. The design of the action was to recover damages for failing to make title to a lot in the town of Portland. The process was sued out against two defendants, but was executed on but one, and the suit was discontinued as to the other, and to the declaration against one only, a demurrer was filed. It will be perceived that the foundation of the action was the certificate, and as the plaintiff proceeded against two defendants *in contract*, he was, according to the well settled doctrine, bound to have them both in Court before he could file his declaration, unless the defendant not found had been pursued to a *pluries*, or the instrument sued on was within the provisions of the statute of the 7th of February, 1818, authorizing discontinuances in certain cases. This statute provides only for suits commenced on bonds, covenants, bills, promissory notes and judgments of Courts of record in other States or Territories. It is obvious that the certificate referred to, is neither a bond, bill, nor promissory note; but a mere written statement of a purchase, and its terms sign-



JANUARY 1904.

Thompson  
v.  
Saffold et al.

ed by an agent. The declaration then, by shewing on its face a discontinuance against one of the defendants, in effect shewed that the entire action was discontinued. The demurrer was therefore well sustained.

Judgment affirmed.

JUDGES SAFFOLD and CRENSHAW not sitting.

### DUNHAM V. CARTER and CARROLL.

1. The County Court has no jurisdiction by certiorari or appeal, in cases of forcible entry and detainer.
2. In cases of forcible entry brought up by certiorari, the trial must be an error assigned in the record.

J. DUNHAM, on a complaint for a forcible entry and unlawful detainer, recovered judgment before a justice of the peace of Wilcox county, against A. Carter and A. Carroll. The defendants, by certiorari, carried the cause into the County Court. In the County Court, Dunham moved to dismiss the suit, and strike the case from the docket, for want of jurisdiction in the Court. This motion was overruled by the Court; he then filed a plea to the jurisdiction, insisting that the Circuit only had jurisdiction of the cause; to which plea there was a demurrer, and which demurrer the Court sustained. After this, he moved the Court for judgment of affirmance for want of an assignment of errors. This motion the Court also overruled; and directed that he should file a statement, so that an issue might be made up and tried by a jury, which Dunham refused, and on motion of Carter and Carroll, the Court nonsuited Dunham, for the want of a declaration or statement, and rendered judgment for the defendants for costs, from which Dunham appealed to this Court; and he now assigns those proceedings of the County Court for error.

GORDON and H. G. PERRY, for the appellant.

SHORTIDGE, for the appellees.

By JUDGE CRENSHAW. If the County Court had jurisdiction, it was certainly erroneous to nonsuit the plaintiff for want of a declaration, because it has been set-

JANUARY 1832

Dunham  
v.  
Carter & Car-  
roll.

a Vide McDon-  
ald v. Gayle  
Minor's Ala.  
Rep. 98. and  
Ward v. Lew-  
is. 1 Stew.  
Rep. 26.

tled by at least two adjudications of this Court, that the proceedings in a case of forcible entry and detainer, when certified to an appellate Court, are to be received as a record; that errors must be assigned, and the trial had on the record alone.<sup>a</sup> But the main inquiry is, had the County Court any jurisdiction over the subject matter of litigation? By the act of 1805, it is provided that the proceedings in forcible entry and detainer may be removed to the Circuit Court, by writ of certiorari, and in no other manner. If this act alone is to govern, it is then clear that the Circuit Court is the only appellate tribunal which could entertain jurisdiction of the case.

But in the written argument, which I find among the papers, it is said that a clause of the act of 1807, gave the County Court jurisdiction "of all actions of a civil nature, wherein the value of the matter in controversy shall not exceed \$1000, excepting real actions, actions of ejectment, and trespass *quare clausum fregit*." To this it may be conclusively answered that the clause of the act alluded to, gives the County Court, in the cases there enumerated, original and not appellate jurisdiction, and consequently has no bearing on the question before us.

It is also alleged, that jurisdiction may be inferred from the act of 1812; but it must be recollected that the section of the act referred to, does not enlarge, but manifestly restrains the jurisdiction of the County Court, and therefore confers no new authority, nor gives it any appellate power, which it could not exercise before the passage of the act. It was also insisted on, that from the act of 1822, which gives to the Judges of the County Court concurrent power with the Judges of the Circuit Court, to grant writs of *certiorari* and *supersedeas*, it was fairly inferable that the County Court had jurisdiction. By the section of the act relied on, the Legislature did not intend to give appellate jurisdiction over any case, of which, independent of this section, it did not already possess it; but only intended to prescribe a new mode of proceeding, or rather to clothe the County Court with authority to grant writs of *certiorari*; and which before the act, it seems the Court did not possess. To consider the subject in any light, I think it would be a wrong interpretation of the sense and spirit of these acts, to suppose that by all or either of them, the Legislature intended, among other things, to give the County Court appellate jurisdiction in cases of forcible entry and detainer.

JANUARY 1886.

Dunham  
v.  
Carter & Car-  
roll.

For these reasons, the Court are unanimous in opinion, that the County Court erred, in refusing to dismiss for want of jurisdiction, and in nonsuiting the plaintiff for want of a declaration. The judgment is therefore reversed, and a writ of *procedendo* awarded to the justice.

Judgment reversed.

### MUNN V. POPE.

1. Under the general issue, in assumpsit, any evidence tending to increase or diminish the value of the article sold, is proper evidence, so as to ascertain its true value.
2. If a party agrees to receive property in payment, it may be proven as payment under the general issue, to the extent of its value or stipulated price.

THIS was an action of assumpsit tried in Madison Circuit Court, in which Matthias Munn was plaintiff, and Benjamin S. Pope, was defendant. The action was brought to recover the price of a cotton gin sold and delivered, &c. the pleas were non-assumpsit, payment and set off. On the trial, the plaintiff, under the common counts, proved the delivery of a forty-seven saw cotton gin to the defendant, and that the usual price of gins was four dollars per saw. The defendant proved that the plaintiff agreed to deliver him a first rate gin, and to receive in part payment his old cotton gin, and that he had delivered it to him, and had paid him forty-four dollars for the balance. He also introduced several witnesses to shew that the gin delivered by the plaintiff was not first rate, but was very inferior, and also that soon after the gin was received, that he was compelled to pay another workman \$25, for necessary work to put it in proper repair. To the introduction of this evidence the plaintiff objected, but the objection was overruled, and the evidence was permitted to go to the jury; to which the plaintiff excepted. There was a verdict for the defendant, and judgment thereupon. The admission of this evidence is assigned for error.

BRANDON and URQUHART, for the plaintiff in error.\*

THORNTON & PEETE, for the defendant.

\* Littell's selected cases.  
193-200. 1  
Mason's R.  
83.

By JUDGE PERRY. It is contended that the judgment should be reversed, 1st. Because the Court below permitted the defendant to prove the bad quality of the gin; 2d. Because the Court below permitted the defendant to prove repairs done to the gin; and 3dly. Because the Court permitted the defendant to prove that the old gin was taken in part payment for the new one.

JANUARY 1832.

Mann  
v.  
Pope.

---

As to the first ground taken by the plaintiff in error, I hold it to be a well settled rule of law, that where a party seeks to recover the value of an article sold, all testimony is admissible on either side, which tends to prove or ascertain its true value. The plaintiff was therefore bound to shew what the value of the gin was; this he did, by proving that the usual value of gins per saw was four dollars. This testimony would have authorized a recovery for that amount, had the defendant acquiesced. But as the value of the gin was the matter in dispute, it was competent for him to shew by proof that the gin was of less value than that fixed as the usual price of first rate cotton gins. The testimony was therefore properly received.

The second point taken by the plaintiff is involved in the first, inasmuch as it was necessary to the usefulness of the gin to have it repaired, it was lessened in value, as proved by the plaintiff, to the extent of the repairs made.

The third question presents the inquiry, if, under the general issue, any thing else besides money, can be a payment? I hold it to be an incontrovertable principle, that whatever a party agrees to receive in payment of a debt, will be considered as such, and can be given in evidence under the general issue. The plaintiff, then, by his agreement, promised to take the defendant's old gin in part payment for his new one; so far as the value of the old gin could be ascertained, it was a good payment for so much. The Court are unanimous in the opinion that the Court did not err in admitting the defendant's testimony.

Judgment affirmed.

## WEAKLEY V. BRAHAN and ATWOOD.

1. A party cannot maintain an action for money paid and expended for another's use, by proof that he satisfied a judgment against him without his request or consent.
2. *Seemle*, That after the dissolution of a co-partnership, one partner cannot, by his sole request to a third person to pay a firm debt, give such person a right to maintain an action for money had and received against the firm.
3. *It seems*, however, that where a judgment is paid without the request of the defendant, and the plaintiff takes a transfer of the judgment; that he may prosecute an action on the judgment for his use, and that the payment and transfer will not be considered such a satisfaction as to prevent a recovery.

ROBERT WEAKLEY brought an action of assumpsit against Brahan and Atwood as co-partners, in Madison Circuit Court, to recover the amount of two judgments against them in the State of Tennessee, which he alleged he paid at their request, amounting to \$2,144 30. The declaration was on an *indebitatus assumpsit* for money paid, laid out and expended, money lent and advanced, &c. The defendant, Atwood, pleaded the general issue. Brahan did not appear. The plaintiff moved for judgment by default against Brahan, which was overruled. On the trial, which was at the May term, 1828; the plaintiff proved that two judgments had been rendered in the Circuit Court of Davidson county, Tennessee, against Brahan and Atwood, amounting as above; that proceedings were in progress against the bail of the defendants, and that he, Weakley, applied to the attorney for E. Rawlins, to whom the judgments were due, and expressed his willingness to satisfy them for Brahan and Atwood, having been, as he stated at the time, solicited by them or one of them, probably Brahan, to do so. The attorney of Rawlins agreed to receive, and did receive in October, 1824, the full payment of the judgments, in notes of hand on other persons, payable to Weakley, which he indorsed over, and which were all duly paid. On each of the records there appeared a receipt and transfer by the plaintiff's attorney, as follows: "Robert Weakley having paid the amount of this judgment, it is hereby transferred to him without any recourse, H. Crabb." It was proved that Brahan was the son-in-law of the plaintiff, Weakley. No proof appears on the record to shew that there was any request by the defendants, or either of them, to pay the

judgments, except as above stated. On this proof, the Court charged the jury, that this action being founded on the payment of a debt due by the defendants, it must be expressly proved that the payment was made at the request of the defendants, and that the fact of payment by the plaintiff was not sufficient to authorize the inference that a request was made. The Court further instructed the jury that the request must be made by both of the defendants, to enable the plaintiff to recover in the action, as it was against both; that the jury might infer the request to pay, but the inference must be drawn from some fact proved in the case. To these instructions, Weakley, the plaintiff, excepted. There was a verdict for Atwood, on which the Court rendered judgment for the defendants.

Weakley assigned for error, that the instructions given to the jury were improper.

McCLUNG, for the plaintiff in error.

HOPKINS, for the defendants.

By JUDGE COLLIER. It is a rule of law well ascertained, that one person cannot make another his debtor, against his consent. This rule is, however, subject to exception in case where the legal interest passes by assignment, as promissory notes, bills, &c. and also where judgments, accounts, &c. assigned, are sued on in the name of the party to whom they appear to have been originally due; there the assignment is equivalent to a letter of attorney, to sue in the name of the assignor.<sup>b</sup> But the rule extends to all payments made to another's use, where the action is brought in the name of him who advances the money. Such a case is the one we are considering, and it was an essential point of the plaintiff's proof, in the form of action adopted by him, to shew a request by the defendants to pay the judgments against them, or to prove facts or circumstances, from which such an inference could be deduced by the jury. It cannot certainly be insisted that the fact of payment, or the relationship existing between the plaintiff, and the defendant, Brahan, pre-supposes a request; such an argument denies to the rule any other than ideal existence.

Upon analogy, we think that one defendant, who is charged as having been a partner with another, cannot, after dissolution, bind the other to third persons, by a request to

JANUARY 1839

Weakley  
v.  
Brahan and  
Atwood.

a7 T. R. 177.  
379. 3 John.  
434. 10 John.  
361. 8 John.  
436. 14 John.  
87.

b8 T. R. 177.  
337. 3 John.  
434. 8 John.  
436. 10 John.  
361 and 14  
John. 87.

JANUARY 1830.

Weakley  
v.  
Brahan and  
Atwood.

them to advance money, in discharge of firm liabilities. He cannot make a note, or draw a bill, though he may be authorized to close the business of the concern, which will be operative against both. And we can discover no difference in principle between imposing a liability by a note or bill, and a verbal promise. The singular state of the pleading in this case, is such, Atwood alone having pleaded, and being before the jury, that we should be inclined to think the charge of the Court on this point erroneous, if there was any evidence on the record which could have elicited it. In considering the evidence, we discard from our view the statement made by the plaintiff, as an inducement by him to a settlement of the judgments, for they cannot be received to prove any fact.

From what we have said, it is inferable, that without proof of request, the plaintiff might prosecute actions upon the judgments for his benefit and that their payment by, and transfer to him, would not be considered such a satisfaction as to prevent a recovery.

Judgment affirmed.

### McGREW v. ADAMS and ELLIOTT.

1. To a writ of certiorari, the justice returned the warrant, &c. and a statement certifying that he had rendered judgment, but not setting out a copy of the judgment. It was held, that by going to trial on the merits in the appellate Court, all irregularity in the justice's return was waived.
2. On an appeal, where issue was joined to the country, though the sum in controversy be under \$20, the judgment will not be reversed, because the issue was tried by a jury, instead of the court.
3. Where the demand was under \$20, when the warrant issued, but is increased to more than that sum by interest during the pendency of the appeal, the issue is properly triable by a jury.
4. This Court will not scrutinize the record in cases of appeal so closely as in other cases. Therefore, where the declaration appeared to be as well against the security in the appeal as against the original debtor; after verdict, both being in fact liable, the judgment will not be reversed for that cause.
5. By an agreement, it was consented that the pleadings should be made up after trial, and a declaration appeared in the record, which was insufficient. The Court held, that the agreement cured all defects in the pleadings and stood in lieu of a proper issue.

Writ of error from Marengo County Court. S. J. Elliott recovered judgment before a justice of the peace of

JANUARY 1830.

McGrew  
v.  
Adams & El-  
liott.

Marengo county, against J. McGrew, for \$19 60, besides costs. McGrew, on his petition to the Judge of the County Court, obtained a certiorari to remove the proceedings into that Court, and Adams became his security in the certiorari bond. The justice, in obedience to the writ of certiorari, returned into Court the original summons, a writ of *fi. fa.* and also a statement under his hand and seal, in the following words: "The State of Alabama, Marengo county. The undersigned, a justice of the peace in and for the county aforesaid, in pursuance of a certiorari to me directed from the County Court of said county, do herewith return and send up to the said Court all the papers in the case of Stephen J. Elliott against John McGrew, together with a statement of the proceedings in the said case before me, to wit: summons issued August 23, 1824, returnable the second Monday of September next thereafter, and the plaintiff proving his account, and the defendant not appearing, judgment was given for the plaintiff for nineteen dollars and sixty cents, and costs of suit. Execution issued 22d January, 1825, and returned no property found. Alias issued 7th March, 1825, was levied, and forthcoming bond taken and returned forfeited. Given under my hand and seal, June 28th, 1825, Shelby Corzine, J. P. [seal.]" After several continuances, the cause came on to be tried at the January term, 1827, of the County Court, when the following entry appears on the minutes: "This day came the parties by their attorneys, and thereupon came a jury, &c. who being elected, &c. say they find the issues in favor of the plaintiff, that the said defendant did undertake and promise in manner and form as the plaintiff in his declaration hath thereof alleged, and they assess the plaintiff's damages by reason of the non-performance of his said promises and undertakings, at the sum of twenty-two dollars and eighty-seven cents," on which judgment was rendered for the plaintiff against McGrew and against Adams, as security in the certiorari bond.

A diminution of the record being here suggested by the defendant in error, the following was certified to this Court from the Court below, in return to a special certiorari, to wit: "We agree that the statement and pleadings in the case of Stephen J. Elliott v. John McGrew and Thomas Adams, be made up at any time after the trial, (signed) J. W. Wilson, attorney for the plaintiff, Shelby Corzine, defendants attorney." Also the following statement or declaration, and issue:



JANUARY 1838.

McGrew  
v.  
Adams & Elliott.

"The State of Alabama, Marengo county. In this case, Stephen J. Elliott claims fifty dollars on account of John McGrew and Thomas Adams, which they owe to him, and from him unjustly detain, &c. (signed) John W. Wilson, attorney for plaintiff. Issue joined, (signed) Shethy Corzine, defendants attorney.

McGrew and Adams in this Court assigned various errors, which are noticed in the opinion delivered in the cause.

BARTON & STEWART, for the plaintiff in error.

AIXIN and KELLY, for the defendant.

By JUDGE TAYLOR. The first error assigned in this case, is, that "the Court below erred in proceeding to trial and judgment, before the judgment rendered by the justice of the peace had been brought up by the certiorari."

It appears to be a case brought from a justice of the peace into the County Court, by certiorari. The petition states that a judgment had been rendered against McGrew, the petitioner, in favor of Elliott, by the justice, and for reasons which were deemed sufficient by the Judge of the County Court, he prayed and obtained a writ of certiorari directing the justice to return a complete record of the proceedings before him to the County Court. In conformity with this order, he made a return of the warrant and execution, together with a statement of the time at which judgment was rendered by him, and the sum for which it was rendered. This statement, it is true, does not purport to contain a copy of the judgment, as entered by him on his docket or elsewhere, but it does not require a strained construction to infer that it is such; on the contrary, its precision with respect to dates, sums, &c. forces that conclusion upon the mind. But even if it were not, the petition and bond admit such a judgment, and the defendant, McGrew, who sued out the certiorari, waived every irregularity in the return by going to trial on the papers which were before the Court; and certainly Elliott cannot now be prejudiced by his wrong.

The next assignment which I shall notice, though not the next in the order they are made, is, that "the amount in controversy was not within the cognizance of a jury, and should have been exclusively tried by the Court." I am far from admitting, if this assignment were supported by the record, that it would be error. After a party has

formed an issue to the country, it would be perverting instead of promoting justice, to permit him to reverse a cause on this ground; and it may often happen that a party claims more than \$20, and the jury would be of opinion that less than that sum was due. But in this case, the verdict is for upwards of \$22, and although at the time the warrant was issued, the plaintiff's demand may have been for a less sum than \$20, and interest subsequently accruing may have swelled it above that sum; yet, in my opinion, a jury trial in such case, is the proper one.

The 4th assignment is, that "the plaintiff sued but one defendant in the Court below, and declared against two in the Court above."

JANUARY 1830

McGrew  
v.  
Adams & El-  
liott.

It appears that the warrant was issued against McGrew alone; that Adams became his security in the bond which he gave when he sued out the writ of certiorari, and the statement or declaration was filed against both. Although this was irregular, yet it is not considered as a ground on which the cause can now be reversed. Appeal cases will never be scrutinized so closely as causes in which a larger amount is in controversy, and which are commenced in a Court of record. And in this case no injury can be inflicted upon Adams by this step. He was liable to Elliott, if a recovery were had against McGrew, his principal, and the judgment against him would have followed as a matter of course; and this irregularity would have been cured by an amendment, if an objection had been made to it below, particularly as the issue is presumed to have been made up under the direction of the Court. The defendant cannot be permitted in such a case to lie by, take no advantage of such a defect in the Court below, and come into this Court to reverse the judgment.

The rest of the assignments relate to the want of a proper issue, and other defects in the pleadings.

The statement or declaration, it is conceded, does not embrace a sufficient ground of action; but from the agreement filed by the parties, it appears that they entered into an arrangement that the pleadings should be filed after the trial. It does not certainly appear whether the statement contained in the record, and the issue thereon, were made after or before this agreement; but even conceding that it was after, yet I understand this agreement as amounting in fact to a waiver of all strictness in pleading, and consider it tantamount to an understanding that the parties shall try without any pleadings; and that the agreement shall

JANUARY 1830.

McGrew  
v.  
Adams & El-  
liott.

stand on the record in their stead; and this is certainly the more correct decision, when it is remembered that the statute requires the issue to be made up under the direction of the Court, who, the law presumes, would have it correctly done. And when the parties thus agree to do that between themselves, which otherwise it would be the duty of the Court to superintend, it would be highly unjust to permit such an omission as is now insisted on as a cause of reversal, to prejudice either party.

The judgment must be affirmed; and of this opinion is the whole Court.

2s 506  
93 308

2s 506  
128 281

### McGEHEE V. CHILDRESS.

1. The plaintiff declared in assumpsit on a note for \$1500, to be paid on the happening of a certain event; and averred that the event had happened, as appeared by an indorsement on the note. It was held, that this was sufficient to warrant a judgment by default final for the amount, there being no plea.
2. Suffering a judgment to be rendered by default, is an admission of the plaintiff's cause of action as laid.

THIS was an action of assumpsit, determined in Greene Circuit Court. The suit was brought on a note, which was transcribed in the record in these words: "I promise to pay James Childress, or order, the sum of fifteen hundred dollars, as soon as possession can be given of the plantation that Francis Megee is now living on, known by the name of the French grant, marked E. E. for value received, this 26th day of December, 1822.

ABRAHAM McGEHEE.

Test, THOS. C. FARISH.

On which there was the following indorsement: "I acknowledge of receiving possession this day of the within described land, agreeable to contract, February 8, 1828.

ABRAHAM McGEHEE.

Witnesses, JNO. COCKE, A. HOLLOWAY."

The declaration alleged, "that on the 26th of December, 1822, the plaintiff was the proper owner, and legally authorized to sell a certain plantation that Francis Megee was living on, known by the name of the French grant, (marked E. E.) situate in the county of Greene aforesaid, and in consideration that the plaintiff would give possess-

ion thereof to the defendant, he, the said defendant, on the 26th of December, 1822, by a certain writing called a promissory note, and delivered the same to the plaintiff, undertook and promised to pay the said plaintiff or order, the sum of fifteen hundred dollars, as soon as possession could be given of the plantation that Francis Megee was then living on, known by the name of the French grant, (marked E. E.) for value received. And the said plaintiff avers, that he could not reasonably sooner than the 8th day of February, 1828, give possession of said plantation; and he further avers, that on the 8th of February, 1828, at the county aforesaid, the said plaintiff did give, and the defendant did then and there receive possession of said plaintiff; and which by a certain writing signed with the proper hand of him the said defendant, of the date last aforesaid, and then and there delivered to said plaintiff, more fully appears by indorsement on the back of the promissory note, whereby the defendant, by force of the premises; on the 8th of February, 1828, became liable to pay said sum of \$1500 to said plaintiff, &c. and thereupon promised, &c. The defendant filed no plea to this declaration, and the plaintiff took judgment by default final, at the September term, 1828, of the Court, for \$1572.

JANUARY 1830

McGehee  
v.  
Childress.

McGehee assigned for error, in this Court, among other things, that the declaration was uncertain and insufficient; that the judgment by default final was erroneous, and that the damages should have been ascertained by a jury.

STEWART, for the plaintiff in error, insisted that the note and the indorsement on it, were no part of the record, and could not be referred to for any purpose; that the declaration was all that could be looked to, to shew the cause of action, and sustain the judgment, and that the judgment must stand or fall by the declaration; that the declaration was insufficient for want of precision and certainty, and above all, that it was insufficient to authorize the rendition of a judgment by default final. The instrument sued on is treated as a promissory note, whereas clearly it is not one. A written promise, to be entitled to the character and dignity to a promissory note, and to enjoy the beneficial quality of being evidence *per se* of a consideration, &c. without further proof, must be a promise to pay money absolutely, and for value received; if there be a condition, and it be contingent, or it requires any

JANUARY 1830.

McGehee  
v.  
Childress.

---

other evidence to make it due and payable, it is no longer a promissory note. The instrument must be a promissory note at the time it is made, and if it is not then one, it never can become so by force of any fact happening subsequently. Here the plaintiff is compelled to make out his cause of action, to rely not only on the writing as made, but also on other facts which happened long afterwards, and by connecting the two acts of the defendant together, he makes it out to amount to a promissory note. It is then but written evidence of a contract, and not negotiable paper; and it should have been declared on with all the forms and averments of a special contract, with a full statement of the consideration, inducement, &c. alleging damages for the breach; and then on a judgment by default, a jury should have been empanelled to say what those damages were. The declaration does not aver with sufficient precision and certainty the matter of the indorsement, it does not appear what was indorsed and signed by the defendant on the back of the writing. The nature of the averment does not give to the defendant the proper opportunity to traverse the allegation by a plea, and were it not for the note itself, which is improperly copied into the record, and is no part of it, the Court could not yet tell what was indorsed on the writing. This contract was the proper subject for an inquiry of damages. The declaration, it is true, averred that the possession could not reasonably be delivered sooner than the 8th of February, 1828, but that was a matter which the writing, for aught of it that was set forth in the declaration, did not ascertain; and therefore should be found by a jury. It did not appear but that the possession might have been sooner delivered, in which case the damages would be much reduced.

SHORTTRIDGE & ELLIS, contra.

By LIPSCOMB, C. J. The action is founded on the written instrument, signed by the plaintiff in error, whereby he promises to pay the defendant in error \$1500, on the delivery of possession of the land, for value received. The declaration sets out that Childress was the rightful owner of the plantation described in the instrument; that he had sold it to the maker of the said note; that on the 8th of February, 1828, full and peaceable possession was given of the same, and that it was received by McGehee. There was no plea filed, and judgment was entered up by

default on the note, with interest from the time when the defendant obtained possession. We cannot see the least ground for supposing that the judgment by default ought to have been interlocutory in this case, as contended for by the plaintiff in error. On the happening of the contingency named in the note, it became an absolute promise to pay the sum mentioned; and after the default, there was no necessity for an inquiry of damages. The judgment by default admitted the plaintiff's cause of action as laid in his declaration.

JANUARY 1836.

McGehee  
v.  
Childress.

Judgment affirmed.

### SUGG V. BURGESS and DAVIS.

1. A constable levied nine executions on a negro, and took nine bonds payable to the plaintiff for the delivery of the property. The bonds being forfeited, the plaintiff brought an action of debt and declared in one count on the nine bonds. On demurrer, the proceedings were held to be proper.
2. Such bonds may be good as common law bonds, though not taken strictly as the statute requires.

THIS was an action of debt, brought by William Sugg, in Franklin Circuit Court, in 1828, against R. Burgess, B. Burgess and J. Davis, to recover on nine delivery or forthcoming bonds, each in the penalty of one hundred and ten dollars, made on the 20th of March, 1827, by the persons above named, and payable to the plaintiff. In the declaration, the action was discontinued as to R. Burgess, who was returned "not found," and against the other defendants, after setting out the penal part of the bonds, it was alleged that the said nine bonds, and every of them, were subject to a certain condition thereunder written, &c. reciting, that whereas one Ira Olive, a constable of the county and State aforesaid, had, on the day of the date of said bonds, levied an execution on a negro named Cassius, as the property of R. Burgess, at the instance of the plaintiff; the condition in each bond was, that if said R. Burgess should deliver the property to said Olive, constable, on the first Monday in May next after the date, at the Court House in Russelville, to be sold to satisfy the amount of the debt and costs in each bond mentioned, (which it was averred, was in each case equal to

JANUARY 1830.

*Sugg*  
v.  
*Burgess and*  
*Davis.*

one half the amount inserted in each bond respectively, as penalty,) or that said B. Burgess or said James Davis should do it for him, then the said bonds to be void, else to be and remain of full force and virtue. It was also averred that R. Burgess did not deliver the negro to said Olive, nor pay the amount of the said debts, &c. To this declaration, there was a demurrer, and by the Court, the demurrer was sustained. The plaintiff moved to amend the declaration, by inserting an averment that the executions alluded to in the bonds sued on, were issued by a justice of the peace of Lawrence county, and sent to Franklin, and exhibited the executions in support of the motion, but the Court refused to permit the amendment. Judgment on the demurrer was rendered for the defendants.

*Sugg*, the plaintiff below, assigned for error in this Court, among other things, that the demurrer was wrongfully sustained, and that the motion to amend was refused.

*KELLY & HUTCHISON*, and *W. B. & P. MARTIN*, for the plaintiff in error. The bonds were lawful, and such as the Statute authorizes. The act of 1807, <sup>a</sup> provides, that when forfeited, they shall be returned to the justice issuing them, whose duty it becomes to issue executions against all the obligors. The act of 1814, <sup>b</sup> requires officers to return forfeited bonds to the justices issuing them, that notice shall be given to the obligors, and that if they do not appear in ten days, deliver the property and shew cause why they did not deliver it in due time, judgment shall be rendered against them; but these statutes do not provide for the case of an execution going from one county into another. The act of 1824, <sup>c</sup> directs how an execution should be certified which issues from one county to another, and requires that it shall be returned in not less than thirty, nor more than ninety days after its date, but still no provision is made for returning the bond, giving notice, &c. This was an omission in the statutes, which has only been lately supplied, long after those bonds were given; and for this reason the plaintiff failed to obtain judgments on motion. But again, actions on such bonds for the delivery of property, are sustainable at common law, <sup>d</sup> even if they were not good under the statute; the remedies given by statute on those bonds are cumulative, and do not destroy the common law remedy. The declaration was good in itself, and if there existed any defence against it, it should have been shewn by plea. The

<sup>a</sup> Laws of Ala.  
506.

<sup>b</sup> Laws of Ala.  
pages 313 &  
512. Sec. 17.

<sup>c</sup> Acts of 1824.  
page 15.

<sup>d</sup> 9 John. Rep.  
507. 1 Wash.  
Rep. 367. 1  
Munf. 501. 8  
Call. 421, 524  
1 Call. 41.

demurrer should therefore have been overruled. There was error also in refusing the amendment;<sup>a</sup> the Court has no discretion on such motion except as to the terms it may think proper to impose.<sup>b</sup>

GAYLE, for the defendants in error.

JANUARY 1834

Sugg  
v.  
Burgess and  
Davis.

<sup>a</sup> Laws of Ala.  
454.

<sup>b</sup> Acts of 1824.  
page 17.

By JUDGE WHITE. The Circuit Judge sustained the demurrer to the plaintiff's declaration, and refused to permit the proposed amendment; the only error necessary to be noticed, is that of sustaining the demurrer. Sugg, the plaintiff, declares for \$990, due as the aggregate penalty of nine bonds given to a constable for the delivery of the property levied on; he sets out the making of the bonds, the condition, and for breach, that the negro was not delivered, nor the debts paid. This declaration, to my view, contains all substantial requisites. From the recitals in the conditions of the bonds as set out, it appears the plaintiff had placed nine different executions in the hands of one Ira Olive, a constable, which had been issued on his behalf, against a certain Richard Burgess, which executions being levied on the slave mentioned as the property of said Burgess, he, together with Benjamin Burgess and James Davis, as his securities, executed the bonds sued on, as forthcoming or delivery bonds. These bonds, from the description given in the declaration, were of the ordinary kind, given for a valuable consideration, and a purpose expressly authorized by law; and the plaintiff, instead of suing on each separately, has, to save costs to the defendants, as he might well do, united them all in one action. If, however, the bonds were not taken in strict pursuance of the statute, this would only prevent the plaintiff from proceeding on them in the summary mode, by motion, and could by no means affect his remedy by suit at common law. Had they even been taken to the officer instead of the plaintiff, this could have been done, as appears from various decisions of the Virginia Courts, where there are statutes similar to our own.<sup>c</sup> The Court, therefore, erred in sustaining the demurrer to the declaration, for which the judgment must be reversed, and the cause remanded.

JUDGE TAYLOR not sitting.

<sup>c</sup> 1 Wash. R.  
367. 3 Call.  
454.



## GEE, administrator, v. NICHOLSON.

1. Where a debt was due by A. as principal, and B. and C. as securities, to D. and B. for valuable consideration received of A. promises to pay it to D. and fails to do so, by reason of which it is paid by C. A. may maintain assumpsit for C's use, against B. for his failure to pay the debt.
2. In such action, however, a demand due by A. to B. is a good set off.
3. A demand accruing by reason of a failure of the consideration of part of a note previously transferred by A. to B. and ascertained by a decree in equity, is a good set off.
4. A judgment will be presumed to be in full force, though a writ of error be sued out on it, when the record shews no disposition of the writ of error.

IN the Circuit of Wilcox county, in October, 1824, John W. Williamson, who sued for the use of Theophilus Nicholson, brought an action of assumpsit against Joseph Gee, to recover on an instrument, which was as follows:

"Portland, March 14, 1821. Then received of J. W. Williamson, eleven hundred dollars, which sum is the full amount due by said Williamson in the St. Stephen's Bank, which sum of eleven hundred dollars, I am bound to pay into said bank at St. Stephens, as the several instalments may become due; the day and date above written.

"JOSEPH GEE."

The plaintiff declared specially on this agreement, that Gee had received of him the sum of money mentioned in the receipt, and had promised to pay it into the Tombeckbe Bank, and averred that Gee had wholly failed to pay it, or any part, as the instalments became due, by means whereof he became liable to repay it to him. There were also counts for money had and received by the defendant, to the plaintiff's use, money lent and advanced by the plaintiff for the defendant's use, &c. The defendant pleaded non assumpsit, the statute of limitations, payment, set off, and accord and satisfaction. Pending the suit, the defendant died, and Sterling H. Gee was made a party as his administrator. At November term, 1828, the cause was tried.

a The judgt is thus described in the bill of exceptions, but in the transcript produced as an exhibit, it appears to be a judgment rendered against Nicholson alone, though execution issued against all three. The process also was against the three.

On the trial, the plaintiff read the receipt sued on, and gave in evidence a judgment obtained in Munroe county, by the Tombeckbe bank against J. W. Williamson, Joseph Gee and Theophilus Nicholson,<sup>a</sup> for the same debt; and also a receipt from the sheriff of Munroe county, shewing that the whole of the judgment had been paid by Nicholson. The defendant proved by a receipt signed by Nicholson, that he had paid to Nicholson one half of the amount

he had paid to the sheriff of Munroe, and under the plea of set off, he offered in evidence the record of a suit in Chancery, shewing that Williamson had before that time assigned to Joseph Gee a note made by one Shaw, for \$1250. On this note Gee sued Shaw, and obtained a judgment at law. Shaw filed his bill in equity against Gee, and against Williamson, alleging a fraud by Williamson in the consideration of the note. Williamson never answered the bill, and on the final trial the Court of Chancery decreed a perpetual injunction as to \$500 of the consideration of the note, and restraining the collection of so much from Shaw, or any interest on that sum. The judgment at law obtained by Gee against Shaw was rendered in November, 1823. On Shaw's bill, an interlocutory injunction was granted for the \$500 in the same month. At the April term, 1824, on the answer of Gee, the injunction was dissolved, but at the final trial it was reinstated and made perpetual as before stated. It further appeared that on the 2d of June, 1825, Sterling H. Gee, the administrator, had sued out a writ of error to the Supreme Court to reverse this decree, but no further disposition of this writ appeared in the transcript produced. These proceedings were produced to shew the existence of an actual demand equal to the deficit in the note, as being due by Williamson to Gee's administrator; but the record was rejected as improper evidence. It did not appear that Williamson had paid any thing to the bank or to Nicholson. The defendant's counsel requested the Court to instruct the jury that Williamson could not maintain the action, and that the suit should have been in the name of Nicholson for money paid, laid out and expended, but the Court instructed the jury that Williamson could maintain the action. To these several decisions of the Court, the defendant below excepted. There was a verdict for the plaintiff for \$625 99, and judgment thereupon.

The errors assigned by Gee, the plaintiff in error, are, that the evidence of set off was rejected, and the instructions requested by him refused.

210 John. R.  
250. 3 John.  
R. 247. 2 T.  
R. 32. 8 John  
Rep. 249. 1  
Munf. 501. 3  
Hay. 195.

HITCHCOCK, GORDON and BAGBY, for the plaintiff in error.<sup>a</sup>

PARSONS & COOPER, for the defendant.

By JUDGE TAYLOR. It appears that Williamson

JANUARY 1839.

Gee, adm'r  
v.  
Nicholson.

---

had executed his note to the Tombeckbe Bank, with Gee and one Nicholson as his securities. That some time after this, by an arrangement which was entered into between Gee and Williamson, and for a valuable consideration, Gee executed the instrument of writing on which this action is founded, by which he promised to pay the debt due the said bank, "as the several instalments may become due." The note due to the bank was not discharged in conformity with this agreement, and suit was instituted thereon against the payors, and a judgment, which, from its defectiveness, is totally void, was rendered against Nicholson alone; an execution appears to have been thereon issued against all the defendants, and one half of the amount of the execution was paid by Gee, and the other half by Nicholson. It further appears that said Williamson assigned at another time to the said Gee, a note on one William Shaw; that suit was instituted by Gee against Shaw, and judgment was recovered for the whole amount of this note; that Shaw instituted a suit in Chancery against Gee and Williamson, and upon filing his bill, obtained an injunction on the allegation of fraud in the consideration for this note. The injunction, on the coming in of the answer, was dissolved, and the whole of the money was collected by Gee, but afterwards, on the final hearing of the bill, a decree was rendered perpetually injunction about \$800 of said judgment; from this decree, a writ of error was subsequently sued out by Gee's administrator, of the prosecution or result of which there is no evidence. This decree in favor of Shaw, was offered as evidence under the plea of set off, and rejected, and to the opinion of the Court rejecting this evidence, an exception was taken, and it is now insisted, 1st. That there is no cause of action in the declaration; and 2nd. That the evidence should have been admitted.

In support of the first point, it is contended, that Williamson cannot sue on the instrument which is made the foundation of the action, until he has suffered by Gee's default, and that an averment that he has been compelled to pay the debt to the bank, or a part of it, is necessary to sustain his action.

I do not believe this position is maintainable. The instrument itself formed a sufficient foundation for the action. When the agreement contained on its face was violated, Williamson had a right to sue upon it, for he was liable to the bank, and his remedy against Gee was open and plain.

The other objection, I think, has been well taken. Eight hundred dollars had been perpetually enjoined at the suit of the payor of a note given to Williamson, and assigned by him to Gee, upon proof of fraud on the part of Williamson in the inception of that note. The indorsement was *prima facie* evidence of a full and fair consideration having passed from Gee to Williamson, when this assignment was made. The decree enjoining the collection of a part of this judgment, gave to Gee a right of action against Williamson, for the amount enjoined, and if the contract between them at the time the note was assigned, was such as would prevent a recovery, it would devolve on him to prove it in defence. Nor is it considered that the dissolution of the injunction by the interlocutory decree, and consequent collection of the money, can vary the cause as regards the admissibility of the testimony offered. By the final decree, Gee was bound to repay the money to Shaw; he might have done so, and that fact he could not be permitted to prove until he had laid the foundation for the admission of evidence establishing this fact, by introducing the record which contained that decree. The suing the writ of error can make no difference. We cannot presume the decree to be reversed until this is shown by proof, but must consider it as yet in full force.

JANUARY 1836

Gee, admr.  
v.  
Nicholson.

Judgment reversed, and cause remanded.

JUDGE CRENSHAW not sitting.

2. 515  
107 482

### McBROOM v. SOMMERVILLE et al.

1. A security in an injunction bond filed his bill for relief against a judgment rendered against him on the bond: It was held that he could not go into the merits of the previous decree rendered against his principal, nor of the original judgment at law which had been enjoined, no fraud being alleged in the rendition of the decree.
2. Under some circumstances, the sickness and inability of counsel to attend Court may entitle a party to relief in equity; but if there are counsel in attendance who are unprepared, a motion for a continuance, or new trial at law, is the proper remedy.
3. A Court of Equity cannot, any more than a Court of Law, compel a party to relinquish a security he has fairly acquired, or change it for another. Therefore equity cannot substitute a person as defendant in a judgment in place of another.
4. Where a bill is dismissed for want of prosecution, it operates as a discontinuance, and does not prevent the bringing of a new bill.

THIS was a proceeding in Chancery, determined in

JANUARY 1830.

McBroom  
v.  
Sommerville.

---

Madison Circuit Court, and brought by writ of error to this Court by William McBroom, the complainant below.

In October, 1827, McBroom filed his bill against Alexander Sommerville, James Black, David Ireland, and also against James J. Thornton, John McKinley, Oliver S. Halstead, and Arthur F. Hopkins, their attorneys. The material facts of which, as recited and summed up in the opinion delivered in this Court, are, that Black and Ireland, merchants trading under the firm of Black & Ireland, were indebted to Sommerville, on a note made by them to him for \$4,800, on which there remained due the sum of \$3,798 50; that they transferred and assigned to him notes and accounts due by divers persons to an amount sufficient to pay the debt, without recourse, except only in case of insolvency found by a due course of law; that subsequently, Sommerville met with Black, one of the firm, in Nashville, and having heard that he had shipped a quantity of cotton to the city of New Orleans, for the purpose of paying for a parcel of cotton bagging, which he had directed to be shipped to that port from Scotland, informed him that he had attached the cotton to pay the debt of Black & Ireland; that this was a false representation made by Sommerville; that in fact no attachment had been levied; that Black, with a view to raise the attachment on the cotton, gave his own covenant to Sommerville, to pay him a sufficient quantity of the cotton bagging to discharge the residue of the debt of Black & Ireland; that most of the notes and accounts transferred by Black & Ireland, could have been collected by due diligence. It is further charged, that Sommerville instituted a suit against Black on the covenant; that Black employed Arthur M. Henderson, (his co-partner, James W. McClung being absent,) to defend the suit, and gave him his papers, evidence and instructions for the defence, and having important business, left the United States, and went to Scotland, under the belief that his defence would be made; that Henderson was dangerously ill, and unable to attend at the trial: that McClung was unprepared and unable to make his defence, and in consequence thereof, that judgment was rendered against him for \$2,762 damages, besides costs; that Black filed his bill to injoin the judgment against him, stating substantially the facts above noticed, and that Sommerville, in his answer, admitted the material facts charged in the bill; that he admitted that the covenant had been given under the impression that the cotton had been attached in New Orleans, but that in fact it had not been; but he

JANUARY 1830

McBroom,

v.

Sommerville.

averred that the judgment was not for more than was actually due him, and denied all fraud; that he admitted the sickness of Mr. Henderson, the absence of Black, and that he did not deny the inability of Mr. McClung to make the defence, but denied any negligence in the collection of the notes and accounts transferred. The bill further alleges that for the purpose of obtaining an injunction on this bill of Black; that he, Black, gave an injunction bond, in which the complainant, McBroom, together with one Gaston, became bound as his security. He also charges that there was a final decree dismissing the bill of Black, and that judgment has been obtained against him on the injunction bond in favor of Sommerville. He does not allege any fraud or collusion in obtaining the decree dismissing the bill; he states that Ireland is solvent, and that Black is insolvent. The prayer of the complainant's bill, is, that Sommerville and his attorneys be enjoined from collecting the amount of the judgment obtained against the complainant, that an account may be taken of the proper amount for which he is chargeable on the notes and accounts, and if any thing be found due on such accounting, that it be decreed to be paid by Ireland; there is also a prayer for general relief, &c. At October term, 1827, in the Court below, the defendants moved to dismiss the bill for want of equity on its face, which motion the Court sustained, and the bill was dismissed. This was here assigned for error by McBroom, the complainant, who died pending the suit in this Court, upon which his administrators were made parties.

GAYLE, HUTCHISON, and CRAIGHEAD, for the appellant, argued, and cited 1 Maddox's Chancery, 205. 2 Thomas Coke, 506, (n. 3.) 14 Johnson, 79. 1 Wheaton, 6. 1 Starkie's Evidence, 191-2-3. 199, 3. Wilson. 304. 6 Term Reports, 607. 4 Term Reports, 146. 2 New Hampshire Reports, 26. 5 Massachusetts, 334. Cooper's Equity Pleading, 271, 274. 1 Atkyns, 571. 17 Massachusetts, 237, 2 Atkyns, 44. 4 Brown's Chancery Reports, 60. 4 Johnson's Chancery Reports, 123, 300. Gilmer's Reports, 159. 3 American Digest, 83. 7 Johnson's Chancery Reports, 1. Fell on Guaranty, 214. 17 Johnson, 384. 4 Dess. Reports, 44, 227. 1 Pothier, 246, 247. 10 Johnson's Reports, 524. Paley on Agency, 249, 250. 6 Johnson's Reports, 126. 1 Johnson's Chancery Reports, 73. 2 Dallas's Reports, 236. 1 Washington's C. C. Reports, 320. 14 Johnson's Reports, 501.

JANUARY 1830.

McBroom  
v.  
Sommerville.

HOPKINS, for the appellees, argued in reply, and cited 2 Harrison's Chancery, 193, 195. 1 Harrison's Chancery, 141, 142, 143. 2 Vesey, sen'r. 630. 1 Johnson's Cases, 492, 496. 3 Henning & Munford, 67.

By LIPSOMB, C. J. The complainant prays that the judgment obtained on the covenant, and the decree dismissing Black's bill, may be opened, and that if this cannot be done, then that Ireland may be substituted in the judgment on the injunction bond in his place.

The counsel for the complainant insist that this bill is in the nature of a bill of review, and that Chancery ought to allow him all the equity that Black was entitled to. In answer to this position, it will be only necessary to say, that it does not contain a single essential ingredient of a bill of review; and as there is no fraud alleged in obtaining the decree, there cannot be the smallest pretence for opening and revising the matters charged in that bill; we presume that its merits were fully discussed, and duly considered on the final hearing. It is not important to inquire whether a sufficient excuse was rendered by Black in his bill, for not making his defence at common law when sued on his covenant, all the facts set up by him as grounds of relief could have been used in his defence at law, and it does seem, if we were disposing of that question, that his shewing is a very imperfect one. There is no fraud suggested in the management of the suit, nor in obtaining the judgment. It is true that the inability of counsel from sickness, to attend to a suit, would be a ground of relief under certain circumstances; it is not denied but that Mr. McClung was present, attending to the suit at law when it was tried, and we will presume he felt himself fully prepared for its defence. If the sickness of his partner, Mr. Henderson, had left him unprepared for the defence, it should have been made a ground for a continuance before the trial, or of a new trial after verdict; neither of these modes was resorted to, and we are invoked to draw an inference of surprise without the facts to warrant such a conclusion. The same liberal indulgence is claimed for Black's not sufficiently pressing his rights before the Chancellor on the final hearing of his bill. But as before remarked, these are considerations that grow out of points not material in disposing of the case, for we are certainly not to consider whether the final decree dismissing the bill was based on sound principles of equity or not. The case is 2 Johnson's

Chancery Reports, \* is conclusive, that so far as the complainant seeks relief from Sommerville, that he has no merits at all; it is clear that unless there had been fraud in dismissing the bill on the final hearing, the security to the injunction bond is not entitled to relief. The cases referred to by the complainant's counsel are not in point, and cannot, it is believed, in any degree apply to this case; if a bill has been dismissed for a failure to prosecute, it would not conclude the complainant; he might bring his bill again, and the former dismissal would be no more than a nonsuit or a discontinuance at common law. And this is the doctrine of the authorities relied on by the complainant's counsel; but even in such cases, the security would not be discharged from the forfeiture of his bond.

JANUARY 1880.

McBroom  
v.  
Sommerville.

a Page 213.

It is urged, that as the debt was originally due from the firm of Black & Ireland, and that Black had given his own covenant for the firm debt; that the complainant is entitled to the same recourse against Ireland, that he would have had against Black, and he therefore prays that Ireland may be substituted in his stead in the judgment on the injunction bond. If the liability of Ireland was admitted, yet the conclusion that he ought to be substituted in the place of the complainant, would not follow, for it is certain that if Black himself was solvent, Sommerville could not be compelled to discharge the complainant, and seek satisfaction of his judgment from him; how can a Court of Chancery, any more than a Court of Law, compel a party to relinquish a security, or to change it without his consent, when the liability of such security had been incurred without fraud? If the bill, so far as it professes to be an original bill, had have sought to make Ireland account over to the complainant, the inquiry would then have been, has he any equitable claim for such reimbursement? But as that has not been done, we will decline expressing any opinion of the liability of Ireland to the complainant; if he has any grounds for calling on him for reimbursement, the dismissing of this bill will not preclude his asserting them in a proper form. We are unanimously of the opinion that the decree dismissing this bill, must be affirmed, with costs.

JUDGE WHITE not sitting.



## SADLER, et al v. ROBINSON's heirs.

1. Where money has been paid under a contract, which is rescinded, or alleged to be fraudulent, an action at law lies to recover it back; and in the absence of special allegations of failure of proof, or other matter of equitable relief, Chancery has no jurisdiction.
2. Chancery has not the power arbitrarily to annul or rescind contracts to administer justice, but is bound by rules and precedents.
3. A party cannot claim a rescission of a contract for fraud, after entering into new stipulations concerning it, with a full knowledge of the fraudulent circumstances.
4. Where a contract has not been rescinded, or otherwise determined, the purchase money cannot be recovered back.
5. Long acquiescence in a transaction, without objection, will create a presumption of a waiver of a fraud, and recognition of an act done by another.
6. Where a firm purchased lands, and one of the partners was an infant, he cannot recover back his portion of the purchase money paid to the vendor, the contract being binding as to the other partners, and they having the right to control the firm funds.

THIS cause came by appeal from the Circuit of Madison, sitting in Chancery.

The bill was filed in 1823, by Isaac Sadler, Ethelwin Sadler, and Silenus O. Sadler, against Paulina Robinson, widow of Littleberry Robinson, deceased, and John Dickinson, and Frances, his wife, Rodah Horton, and Christiana, his wife, James Robinson, William Robinson, heirs and distributees of said Littleberry, and William Patton, his administrator. At November term, 1828, the cause came on to be tried on the bill, answers, and proofs, and the Chancellor in the Court below rendered a decree in favor of the complainants, Isaac Sadler and Ethelwin Sadler, surviving partners of the firm of Isaac Sadler & Sons, for so much land as at the price of forty five dollars per acre, would amount to the sum of seventeen thousand dollars; divesting the defendants of title to so much, and vesting it in the complainants, and appointing commissioners to lay it off, and allot it to the complainants. From this decree, the defendants appealed. The record is very voluminous, and contains a great variety of allegations, which are complicated, and set forth much in detail. The facts deemed the material and leading ones by the Court, and those on which the decision was made, are recited in the opinion delivered in the following words:

"It appears from the bill, that in the summer of 1818, Isaac Sadler, the father, Ethelwin Sadler, and Silenus Sadler, the sons, made an agreement with Littleberry Robinson, for the purchase of six quarter sections of land, situa-

ted in the county of Madison, for the sum of forty-three thousand dollars, to be paid in instalments, at different periods of time; that the agreement was in writing, under seal, and executed for the purchasers in the name of J. Sadler & Sons, under which name and style, the purchasers conducted a mercantile establishment; and that Silenus was an infant under the age of twenty-one years. It is charged that Robinson employed what the bill styles, divers stratagems and devices, by which various partial modifications of the contract of purchase were extracted from J. Sadler & Sons, after all which modifications, and with a knowledge of the devices and stratagems alleged, in the latter part of the year 1819, J. Sadler & Sons consented that Robinson should convey the lands agreed to be sold to them, to one Rob't Greer, upon the understanding that Greer would convey the same to two individuals named, *in trust*, to secure the balance of the purchase money remaining unpaid, which several conveyances were executed, and the note of the appellees given to Robinson to pay the amount secured. In the spring of 1820, Robinson proposed to Greer to deliver up to him the notes of J. Sadler & Sons, if he would reconvey to him the lands in consideration thereof. Greer consented, received the appellees notes, and made a re-conveyance, without their consent previously or subsequently given. The bill prays that the purchase money paid by the appellees to Robinson, may be refunded.

From the answers and proof, it appears that the lands had greatly depreciated in value between the summer of 1818, and the spring of 1820; so much so, that at the latter period, they were not worth as much as the part of the purchase money which remained unpaid, though at the time of the purchase, the contract was considered an advantageous one for the purchasers. It also appears that J. Sadler & Sons had become insolvent, and ceased to do business for some time before the re-conveyance by Greer and that the conveyance by Robinson to Greer, was made at the request of J. Sadler & Sons, who stated at the time of the request, that they owed him a large sum of money, and the only means they had of paying him was to permit him to retain what the land would yield, after paying what was due to Robinson. It further appeared, that the re-conveyance was made without the concurrence of the appellees, but that Ethelwin Sadler, with a knowledge that Greer had re-conveyed to Robinson, observed to the appellant Horton, that he thought the land was worth more than the balance of the purchase money, but that Greer

JANUARY 1830.

Sadler et al.  
v.  
Robinson's  
heirs.

JANUARY 1830.

Sadler et al.

v.

Robinson's  
heirs.

must do as he thought best. The bill, answers, and proof, discovered several other facts, which it is not deemed material to recite, as a decision of the cause does not in any manner depend upon them. Many of the alleged stratagems and devices are explained away by the answer of Horton, or disproved by depositions. Pending the suit, Silenus D. Sadler died, and the cause is continued in the name of his administrator."

HOPKINS and BRANDON, for the appellants, argued, and cited 1 Marshall, 311, 165, 513. Coxe's Digest, 748, section 45; 727, section 49. 2 Desaussure, 145. 9 Johnson, 285. Newland on Contracts, 11, 14. 3 Johnson's Chancery Reports, 23. 9 Cranch, 160. 3 Johnson's Cases, 60. 1 Johnson's Chancery Reports, 370, 582. 4 Dallas, 345. Littell's Selected Cases, 340. 7 Cranch, 97. 2 Marshall, 149, 512. 3 Atkyns, 190. 12 Johnson's Reports, 436. 9 Johnson, 450.

HUTCHISON and SHORTBRIDGE, for the appellees, in reply, cited 9 Johnson, 450. 6 Johnson's Chancery Reports, 111, 222. 5 Johnson's Chancery Reports, 224. 1 Johnson's Chancery Reports, 131, 273. 14 Johnson, 15. 17 Johnson's Reports, 437. 7 Johnson's Chancery Reports, 547. 4 Cranch, 137. 6 Munford, 261. 1 Marshall, 505.

a 2 Comyn.  
Con. 52 to 86.

By JUDGE COLLIER. The object of the bill, though it has a prayer for general relief, is obviously to recover from the appellants the money paid by the appellees to Robinson in his life time, on the footing of their purchase; and so considered, it cannot be entertained; because the powers of a Court of law are as adequate to the achievement of its purposes as those of Chancery.<sup>a</sup> No reason is suggested by the bill, why the appellees cannot have justice administered to them at law; no discovery is asked for, as essential to enable them to prosecute their rights; no deficiency of strict legal proof is complained of. On what ground then the appellees ask the interposition of Equity, we are unable to comprehend. It cannot be because they charge their vendor with fraud; for every circumstance alledged as fraudulent, could it avail them, is fully examinable at law. Is then Chancery appealed to, to rescind the contract of purchase, that all barriers to a recovery by the appellees may be removed? It possesses not the transcendent power of annulling the contracts of parties causelessly and at pleasure. It is its of-

fice to interpose, when the law is unintentionally harsh, by the application of general principles to particular cases; or where the law forums, by reason of their rules of procedure, are so restricted in the dispensation of justice as not to embrace within their reach particular cases, because of the complexity of facts or the peculiarity of the remedy. In its judicial action, principle and precedent are its guides; it claims no dispensing authority.

It is already remarked that the object of the appellees' bill can be as well attained at law as in equity. But neither tribunal can afford them the relief it contemplates, unless their contract of purchase has been rescinded either by the election of one of the parties when it was competent to elect or by their mutual consent. In order to ascertain whether there has been a rescision, it cannot be important to inquire how far the circumstances existing anterior to the conveyance to Greer, and alledged as fraudulent are sustained by proof; or whether in themselves they constituted such a fraud as authorized the appellees to consider the contract between them and their vendor as at end. From the shewing of the appellees, the agreement to purchase was varied, according to the wishes of Robinson, with a full knowledge that these circumstances had transpired; the appellees do not shew that they were forced to consent to a modification of their contract, by the employment of that physical or moral coercion, which is held sufficient to avoid a contract at law or in equity. If Robinson had refused to perform the agreement on his part, it was competent for them to have rescinded it, and to have recovered back so much money as had been paid on the faith of the purchase. This course they seem not to have adopted, but to have stipulated again and again, according to the varied requisitions of their vendor. And they cannot now be heard to say that the contract is at an end, for any cause of which they were advised previous to the conveyance from Robinson to Greer, which it is admitted was made with their approbation. If a party may abandon his contract while *in fieri*, he should act promptly and decidedly on the first breach of the other party. If he afterwards negotiate with him, he waives his right to rescind the contract.<sup>a</sup>

A fraud, in legal understanding, is the *suppressio veri*, or the *suggestio falsi*; hence there can be no fraud where a party possesses full information in regard to the subject about which he contracts. The fraud charged, antecedent to the transfer of title from Robinson to Greer, being

JANUARY 1830.

Sadler et al.  
v.  
Robinson's  
heirs.

<sup>a</sup> Lawrence v.  
Dale, 3 John.  
Ch. Rep. 23.

JANUARY 1830.

Sadler et al.  
v.  
Robinson's  
heirs.

within the knowledge of the appellees, they cannot be permitted to insist on it. Whether subsequent circumstances can avail the appellees, will depend upon a solution of the question, whether these circumstances evidence a fraud, or whether they have not been waived by the appellees.

a Ketchum v.  
Evertson. 13  
John 359.

In respect to the rescision of the contract, none of the circumstances related by the appellees in their bill, shew that it has been rescinded. If the vendor had refused to perform it, it might then be considered as rescinded; but it does not appear that performance has ever been refused by him or his heirs.<sup>a</sup> We are not authorized to consider the re-purchase from Greer by Robinson, as having been made because of his unwillingness to comply with the contract of sale to the appellees; but rather because of the inability of the appellees to comply. Lands, located where the tract in regard to which this controversy is, had depreciated very greatly in value between the time of their purchase and the re-sale by Greer; so much so, as to render it of less value than the balance of the purchase money due.

If Greer reconveyed to Robinson without the authority of the appellees, by the acceptance of the deed, Robinson was placed in the situation, with regard to them, which Greer had before occupied. And if equity would have considered Greer as a trustee for them, obliged to convey his *cestui que trust*, when they should complete the payment of the purchase money, Robinson would be so considered, and incur a similar obligation; and might be compelled, if the appellees have not waived their right, upon a suit in equity, offering to pay the balance, and praying a performance according to the contract of purchase, to convey the legal title. But this is not the relief which the appellees desire.

Saying nothing of the circumstances of suspicion, under which the appellees came before the Court, their long acquiescence in the transfer of title from Greer to their vendor, without having objected to it, or offered to comply with their contract, or demanded a compliance from Robinson or his heirs, may well authorize the inference, that it had received their subsequent assent, either expressly or impliedly. The appellees deny that they have ever assented to the re-conveyance. Greer, in his deposition merely relates that the re-conveyance was made

b Clark's ex-  
ecutors v Van  
Reimedyk, 9  
Cranch, 154.

without their approbation or concurrence. The circumstances are such, however, in the absence of an express dissent, as to authorize an inference of assent.<sup>b</sup>

The record does not present the question as to the competency of Greer as a witness; his relationship to S. O. Sadler, only appears incidentally in the answer of the appellant Horton, which in that particular is not responsive to the appellee's bill.

JANUARY 1830.

Sadler et al.  
v.  
Robinson's  
heirs.

In respect to the infancy of S. O. Sadler, when the purchase was made, it can have no influence upon this controversy; if the contract was void as to him, it would still be valid as to the other purchasers; and even if the purchase money was paid by the firm, his portion cannot be recovered back, unless a fraud was practised upon his rights by Robinson, in procuring payment from that source. It is competent for one partner to dispose of the money of the firm, for what purposes he pleases; and where there is no fraud on the part of the receiver, he will not be compelled to refund. It is not pretended that Robinson, in the reception of the money, acted in fraud of S. O. Sadler's rights. Infancy might have availed him as a defence, had suits been instituted against him on the notes made by the firm.

It is needless to inquire how far one partner can bind the firm, by writing under seal in the co-partnership name; neither the bill nor the proof bring that point legitimately before the Court. The agreement for the purchase was executed in the name of the firm, but for any thing appearing to the contrary, all the partners were present, assenting to the purchase and the execution of the agreement which would make it as valid as if each had executed for himself.

To recapitulate, we have endeavored to establish, 1. That the appellees can only have a return of the money paid, upon the contract being rescinded; to obtain which the remedy at law is fully adequate; 2. That the contract has not been rescinded, hence there can be no recovery; 3. That the infancy of S. O. Saddler cannot avail the appellees, as Robinson, in receiving the money of the firm, did not intend a fraud upon his rights; 4. That the re-conveyance by Greer to Robinson has received the implied assent of the appellees, may be inferred from their long acquiescence, and other circumstances. The record presents other questions which we have omitted to examine, either because they are embraced by those considered, or are unimportant to a decision of the cause.

We are of opinion that the decree of the court below must be reversed.

JUDGE PERRY not sitting.



# INDEX

## TO THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

### ABATEMENT.

1. Where a party pleads in abatement, and after the plea is overruled, he pleads to the merits, he cannot insist on the same matter in arrest of judgement. *Davis v. Dickinson, et al.* 370
2. Nor can he assign for error the decision on the plea in abatement. *Wade v. Kelly & Hutchinson,* 443

### ABSCONDING DEBTOR.

See Attachment 1.

### ACCEPTOR.

1. On a question whether a letter contains an acceptance of an order, although it contain the words "*I shall accept*," if from the whole letter it appear that no acceptance was intended, it will be construed as a refusal. *Mugrove v. Hudson,* 464

### ACTION.

1. An action at law lies to recover back money paid on a parol purchase of land. *Allen v. Booker,* 21
2. And also to recover back the value of goods so paid. *Semble. Keath v. Patton,* 38
3. A corporation created in another state may maintain an action here. *Lucas v. Bank of Georgia,* 147
4. The bearer of a sealed instrument, made payable to A. B. or bearer, and transferred by delivery, cannot maintain an action on it in his own name. *Sayre v. Lucas,* 259
5. An action of debt on a guardian's bond must be in the name of the judge of the county court, for the use of the party injured. *Davis v. Dickson, et al.* 370
6. And the bringing of the action is sufficient evidence, that it is instituted at the request of the party injured. *Ibid.*
7. An action lies against the obligor in a bond, given to answer a charge of being father to a bastard, if the defendant fail to appear, though there has been no conviction against him. *Lake & Barron v. The Governor,* 395
8. Where more than \$50 is due on a note, the

- holder may maintain an action for \$50, in a justices court, by relinquishing the surplus. *King v. Dougherty,* 487
9. A party cannot maintain an action for money paid for another's use, by proof that he satisfied the judgment against him without his request or consent. *Weakly v. Brahan & Atwood,* 500
10. And a request by one partner, after a dissolution of the firm, does not give a right of action against the firm, to one who has paid a firm debt on such request. *Semble, Ibid.*
11. *It seems,* however, that one who pays a judgment against the defendant, without his request, and takes a transfer of it, may maintain an action on it, in the name of the plaintiff, for his use. *Ibid.*
12. Where A. as principal, and B. & C. as securities, are indebted to D., and B. for a valuable consideration received of A. promises to pay the debt, and fails to do so, by reason of which it is paid by C., C. may maintain an action in A's name, for his use against B. for the amount. *See Adm'r v. Nicholson,* 512

See Discontinuance 4.

See Partnership 1, 2, 3, 10.

### ADMINISTRATOR.

See Executors and Administrators.

### AGENT.

1. A partner may appoint an agent to draw bills, &c. in the name of the firm, and such power is not void, though made by one partner only, and under seal. *Lucas v. Bank of Darien,* 280
2. But whether such power can extend to authorise the agent to enter an appearance in court for all the partners, *querie?* *Ibid.*
3. Where the party, with full knowledge of alleged fraudulent circumstances, recognises a contract made by an agent in his name, he cannot afterwards set up the fraud or want of authority in that agent. *McGowen v. Garrard & Morgan,* 479



## AGREEMENT.

1. An agreement founded on a consideration against public policy, whether for the whole or in part only, is void. *Carrington v. Cal-ler*, 175
2. And an association formed to buy and resell at a profit, the public lands at the government sales, and to prevent competition is against public policy. *Ibid.*
3. And a bond given to such association for lands bought of them is void. *Ibid.*
4. When it is agreed that a deposition shall be taken and read, it is admissible, though it appear by the deposition that the witness was interested. *Stebbins v. Sutton*, 249
5. An ante-nuptial agreement, by which the husband relinquishes all right to the property of the wife, and agrees that she shall enjoy her separate property to her own use, does not bar the husband's right of courtesy. *Rockon v. Lecatt*, 429  
*See Contract.*

## AMENDMENTS AND JEOPAILS.

1. A clerical mistake, apparent on the record may be amended, on motion, by the court below. *Wade v. Kelly & Hutchison*, 443
2. And such misprisions may be corrected in this court, but at the cost of the plaintiff in error. *Ibid.*
3. On an appeal, the judgment in the court below was against C. as security, when by the appeal bond it appeared that P. was the security; judgment reversed and rendered against P. *Grant & Conner v. Pettybone*, 445

## ANSWER IN CHANCERY.

*See Chancery.*

## APPEAL.

1. The supreme court has a general super-  
vising power over all inferior judicial tri-  
bunals, which may be created, so as to pre-  
vent the violation of a positive right. *Bell  
et al. v. Payne & Williams*, 414
2. But the legislature may lawfully give power  
to commissioners to determine without ap-  
peal, what persons are entitled to pre-emp-  
tions under the act of 1829. *Ibid.*

## APPEAL FROM JUSTICE OF PEACE.

1. On an appeal from a justice, no exception  
can be taken for the want of a seal to the  
warrant. *Rutledge v. Rutledge*, 400
2. On an appeal the judgment was against C.  
as security, when by the bond it appeared  
P. was the security; judgment reversed and

- rendered against P. *Grant & Conner v.  
Pettybone*, 445
3. On appeals from justices courts, security for  
costs may be required of non-residents, as  
in other cases. *Thompson v. Miller*, 470
4. Justices have jurisdiction for the recovery of  
the value of specific articles bailed and not  
re-delivered according to promise; and of  
all demands in form *ex contractu*. *Span  
v. Boyd*, 480
5. In cases of appeal, technical nicety and for-  
mal declarations are not required. *Ibid.*
6. When parties go to trial on the merits in  
the appellate court, all irregularities in the  
justices return are waived. *McGrew v.  
Adams & Elliott*, 502
7. Where on an appeal, issue is joined to the  
country, though the sum in controversy be  
under §20, the judgment will not be re-  
versed, because the issue was tried by a jury  
instead of the court. *Ibid.*
8. And where the demand was under §20  
when the warrant issued, but is increased  
to more than that sum by interest during the  
pendency of the appeal, the issue is proper-  
ly triable by jury. *Ibid.*
9. In cases of appeal the court will not scruti-  
nize the record as closely as in other cases;  
therefore, where the declaration appeared to  
be as well against the security in the  
appeal, as against the original debtor, af-  
ter verdict, both being in fact liable, the  
judgment will not be reversed for that cause.  
*Ibid.*

*See forcible entry and detainer.*

## APPEARANCE.

1. A writ was issued against three defendants,  
was served on two of them, and there was a  
declaration and judgment against three; the  
record reciting that "the defendants, by  
their attorney, waived their plea;" held  
that this was the appearance of those only,  
who were served with process. *Williams  
et al. v. Lewis*, 41
2. Whether a partner can lawfully authorize  
an agent to enter an appearance in court for  
his copartner, *quere?* *Lewis v. Bank of  
Darien*, 280

## ARBITRAMENT AND AWARD.

*See Award.*

## ARREST OF JUDGMENT.

1. Where a demurrer to a plea in abatement  
has been sustained, and the defendant  
pleads over, he cannot move in arrest of  
judgment for the same matter contained in  
the plea. *Davis v. Dixon et al.*, 370
2. In the record there were three pleas which

were demurred to, but no disposition of the demurrer; a trial on the merits and a motion in arrest of judgment: held that the motion in arrest of judgment was an abandonment of the pleas. *Ibid.*

## ASSAULT AND BATTERY.

*See Costs, 6, 7.*

## ASSETS.

1. A bond made payable to an administrator, as such, is assets in the hands of an administrator *de bonis non*. *King v. Green et al.* 133

## ASSIGNMENT.

1. A debtor has a full right to prefer some creditors to the exclusion of others, and may lawfully stipulate, that those who accept the property assigned shall release him, the contract being voluntary. *Robinson v. Rapelye & Smith.* 86
2. A deed of assignment by a debtor, of all his effects for the benefit of all his creditors, is not void on account of the debts and property not being particularly described and specified. *Ibid.*
3. And such deed will be operative against an attaching creditor here, though executed in New York. *Ibid.*
4. The insolvency of the debtor does not vary the above rules, there being here no bankrupt law. *Ibid.*
5. A note under seal, payable to A. B. or bearer, is not assignable by delivery, so as to enable the bearer to bring an action on it in his own name. *Sayre v. Lucas.* 259
6. A corporation may assign its effects to a trustee, for the benefit of creditors. *Pope v. Brandon et al.* 401
7. And such assignment will be effectual against a judgment creditor, though the charter provides that the stockholders shall be personally responsible for the debts of the corporation. *Ibid.*
8. The assignee of a bond transferred after due, takes it subject to all equitable defences. *Teague v. Russell & Moore,* 420

*See Action, 9, 10, 11.*

*" Cotton Receipt, 1, 2.*

*" Executor and Administrator, 2.*

## ASSUMPSIT.

1. In assumpsit, a judgment by default for costs only and no damages, is error. *Pickens v. Hayden & Meriam,* 10
2. Assumpsit lies to recover back money paid on a parol purchase of land. *Allen v. Booker,* 21

3. In a common count in assumpsit, the consideration of the assumpsit must be sufficiently specified to shew that the demand is on simple contract. *Maury v. Olive,* 472
4. The plaintiff declared in assumpsit, on a note to be paid on the happening of a certain event, and averred that the event had happened, as appeared by endorsement on the note: it was held that this was sufficient to sustain a judgment by default final, for the amount of the note. *M'Gehee v. Childress,* 506
5. Suffering a judgment to be rendered by default is an admission of the plaintiff's cause of action as laid. *Ibid.*

*See Pleading III.—1.*

*" Promissory Note, 2, 3.*

## ATTACHMENT.

1. An affidavit that a party is about to remove himself out of the county of his residence, so that the ordinary process of law cannot be served on him, is not sufficient, to authorize an attachment to issue. *Wallis v. Murphy,* 15
2. A deed of assignment by a debtor of all his effects for the benefit of his creditors, though made in New York, will prevail against a creditor here, who has subsequently attached the effects assigned. *Robinson v. Rapelye & Smith,* 86
3. A judgment on an original attachment is *prima facie* evidence of a debt here, though personal service does not appear. *Miller v. Pennington,* 399  
*Bigger, administratrix. v. Hutchings & Smith, administrators,* 445
4. But such a judgment may be impeached by plea, shewing that the defendant constantly resided here, and had no notice of the suit. *Ibid.*

*See Garnishee.*

## ATTORNEY.

1. Where a suit is instituted by a corporation, can the authority of the attorney who institutes it be inquired into—*quere?* *Lucas v. Bank of Georgia,* 147
2. And pleading the general issue to a declaration wherein profert is made of the authority of the attorney, is a waiver of such right, if any exists. *Ibid.*
3. Under some circumstances, the sickness and inability of counsel to attend court may entitle a party to relief in equity; but if there are counsel in attendance, who are unprepared, a motion for a continuance, or a new trial at law, is the proper remedy. *M'. Broom v. Sommerville et al.* 519

## AUTHENTICATION.

1. In authenticating a record under the act of Congress, it must appear that the judge who certifies is the presiding magistrate of the particular court or district. *Johnson v. Howe's administrators*, 27
2. Also it must appear that the clerk who certifies was clerk at the date of his certificate. *Ibid.*
3. A clerk may lawfully make a certificate of attestation of a record, though he be not within his county. *Collier v. The State*, 368

## AWARD.

1. Awards are much favored, and the court will intend every thing which the record will warrant, to sustain a judgment rendered on an award. *Tankersley v. Richardson*, 130
2. And a judgment on an award will not be set aside on account of the absence of a declaration. *Ibid.*

## BANK.

1. A bank charter is a contract, and the grant cannot be altered or impaired by an after statute without the consent of the bank. *The State v. The Tombeckee Bank*, 30
2. When a bank charter contains no provision declaring a forfeiture on a failure to pay specie for its notes, such a failure is not a forfeiture of the charter. *Ibid.*
3. A bank incorporated in another State may sue here. *Lucas v. The Bank of Georgia*, 147
4. And a copy of its charter, and parol evidence of its being in operation, will be sufficient proof of its existence. *Ibid.*
5. A bank is not affected with notice of dissolution of copartnership, by the fact that one of the partners is a director of the bank. *Lucas v. The Bank of Darien*, 280
6. Nor is notice dispensed with, because the bank was established after the dissolution of the copartnership. *Ibid.*

## BASTARDY.

1. The bond required to be given under the act of 1811, by a defendant charged as father of a bastard child, is properly payable to the Governor. *Lake & Barron v. The Governor*, 395
2. And on such bond the defendant is liable, if he fail to appear, though there have been no conviction against him. *Ibid.*
3. And in an action on such a bond, which was in the penalty of \$2,000, the defendant failed to appear, and the court gave judgment for \$500, without a jury: held that it was not error. *Ibid.*
4. A bond of this description is not within the

statute of 1824, requiring breaches to be assigned. *Ibid.*

## BEARER.

See *Promissory Note 1.*

## BEQUEST.

See *Will.*

## BILL OF EXCEPTIONS.

1. A bill of exceptions must be explicit in stating the necessary facts to shew the error, and the court will not intend that facts were proven, other than those stated. *Keath v. Patton*, 38
2. But the whole evidence need not be stated. *Allen v. Booker*, 21
3. A bill of exceptions, signed by the judge who presided below, was presented: but the certified record containing another, which the judge stated to be the true one; the one offered was rejected. *Lecatt v. Strang*, 230
4. Where the court refuses to sign a bill of exceptions, and the party wishes to establish the exceptions by proof, under the statute, it must be done within the trial term; and on notice to the opposite party. *Perkins v. Harper*, 477

## BOND.

1. A bond made payable to an administrator as such, is assets in the hands of an administrator *de bonis non*: the description is not mere *descriptio personae*. *King v. Green et al.*, 133
2. The intermarriage of an administratrix obligee with the obligor, does not extinguish the debt, but only suspends the right of action during her administration and coverture. *Ibid.*
3. A bond, given for lands bought of an association formed to purchase lands at the public land sales to resell them at profit and to prevent competition, is void. *Carrington v. Caller*, 175
4. The bond required of the defendant under the bastardy act of 1811, is properly payable to the governor. *Lake & Barron v. The Governor*, 395
5. An injunction bond, when forfeited, has of itself the force and effect of a judgment; yet a judgment on a *sci. fa.* on such bond will not be reversed for error. *Boggs v. Bandy*, 459
6. In the condition of an administration bond, by mistake it was written, that if "M. R." [who was the deceased.] should properly administer, &c.; the mistake being apparent on the face of the bond, it was held that this did not vitiate, and that with pro-

per averments, the bond might be declared on. *Moore et al. v. Chapman*, 466

7. A constable levied nine executions on a negro, and took nine bonds payable to the plaintiff, for the delivery of the property; the bonds being forfeited, the plaintiff brought an action of debt, and declared in one count on the nine bonds: on demurrer, the proceedings were held to be proper. *Sugg v. Burgess & Davis*, 509

8. Such bonds may be good as common law bonds, though not taken strictly as the statute requires. *Ibid.*

See *Debt* 5.

" *Penalty* 4. 5. 6.

" *Release*.

#### CASTING VOTE.

See *Officer* 1.

#### CERTIORARI

See *Appeal from Justice*.

#### CHANCERY & CHANCERY PRACTICE

1. Chancery has jurisdiction to relieve a sheriff where judgment has been obtained against him, for failing to return an execution three days before court; a sufficient excuse being shewn for such failure, and also for the failure to make defence at law. *Roberts & Battle v. Henry*, 42
2. In equity, a purchase by an administrator, at his own sale by auction, where no unfairness appears, is *prima facie* valid, and is not void *per se*. *Brannan et al v. Oliver*, 47
3. Nor will such a sale made in South Carolina be held void here, though made without an order of court, the laws of South Carolina not being produced to show such order to be necessary. *Ibid.*
4. In July, 1819, P. as principal, with E. as security, gave their note, payable in six months, to B. for \$3000, to bear interest at five per cent a month. In March, 1821, B. without the consent of E. at the time, entered into a new contract with P. who secured the payment of \$3,500 in one year, and \$4,000 in two years, by a deed of trust on twelve negroes, and B. agreed to remit the remainder on said sums being paid: P. absconded with the negroes. In January, 1822, E. under the influence of alarm and mistake as to his legal rights, consented to give B. his notes for \$6,600, and received an assignment of the original note, and deed of trust; both believing that five per cent a month was recoverable on the original note, till paid. E. on these notes, paid \$4,400, and was notified by his principal, not to pay more than was lawfully due on the original note, at his peril. It was held,

1. That B. on the original note, was only entitled to interest at five per cent a month till its maturity, and at eight per cent *per annum*, afterwards.

2. That the extension of time given released the security.

3. That the notes of E. for \$6,600 were not void for usury.

4. That E. being a security, was entitled to relief in chancery, against all but the balance of the original debt, computing interest at 5 per cent a month till due, and 8 per cent *per annum* afterwards. *Ellis v. Bibb*, 63

5. In what cases chancery has jurisdiction to grant writs of *ne exeat*. See *Lucas v. Hickman*, 111

6. Chancery will relieve a surety against an execution, where the sheriff has made the money by a levy and sale of the principal's effects, has returned 'no money made,' and has absconded. *Fryer v. Austill*, 119

7. The answer of a defendant in chancery is not evidence against a co-defendant, particularly where it tends to invalidate a title made by himself. *Collier v. Chapman et al.* 163

8. Chancery will restrain a party from keeping a public bridge without authority, and free of toll, whereby is destroyed a ferry established by law at the same place. *Gates v. McDaniel & Spurlin*, 211

9. It seems that a party may be joined in chancery for the purposes of discovery merely. *Cato v. Easley*, 214

10. An infant defendant in chancery, having been admitted to make full defence by his guardian, the revising court will consider the sanction given to such mode of defence, as equivalent to an appointment of guardian *ad litem*. *Ibid.*

11. It is no error that a decree does not fix a time within which an infant may impeach it, as a time is given by statute. *Ibid.*

12. A voluntary settlement in favor of children, under certain circumstances, will be set aside as fraudulent, as against an existing creditor. *Ibid.*

13. The answer of a party in chancery is evidence against him, and also so much of the bill as is necessary to explain the answer. *McGowan & wife v. Young*, 276

14. Though a party be enjoined from removing property out of the State, yet he may maintain trover against his adversary, for his conversion. *Ibid.*

15. After judgment at law here, on a record from another State, a want of jurisdiction of the sister State over the person of the defendant, is no ground for relief in equity;

- such defence being available by a plea at law. *Lucas v. The Bank of Darien*, 280  
*Miller v. Pennington*, 399  
*Bigger adm'r v. Hutchings & Smith adm'rs.*, 445
16. Equity will not relieve against a judgment at law, for mere technical defects in the proceedings. *Lucas v. Bank of Darien*, 280
  17. All the parties in interest should be joined in an equity proceeding, but to this rule there are exceptions. *Ibid.*
  18. Those only against whom process is prayed, are to be considered as defendants in a chancery suit. *Ibid.*
  19. A bill for discovery must state the matter sought to be discovered, show that it is material, and state the nature of the defence at law, and not deal in vague inquiries. *Ibid.*
  20. Affirmative allegations in an answer, not responsive to the bill, must be proved at the trial. *Ibid.*
  21. But where the answer is not traversed, it is to be taken as true. *Semble*, *Ibid.*
  22. Chancery will lend its aid to a creditor, to pursue an equitable fund for the satisfaction of his debt, if he cannot obtain payment at law. *Lucas et. al. v. Atwood et. al.*, 378.
  23. And when he has subjected such fund by reason of superior diligence, he may retain it, and it will not be subject to general distribution. *Ibid.*
  24. The creditor who first applies to chancery for the benefit of an equitable fund, is entitled to the preference. *Ibid.*
  25. Courts of equity regard rather matters of substance in determining the rights of parties, than mere technicalities. *Ibid.*
  26. The supreme court has a general supervising power over all inferior tribunals, to prevent, by injunction, the violation of any positive right; but cannot control the decision of the commissioners, under the act of 1829, in relation to pre-emption rights. *Bell et al. v. Payne & Williams*, 414
  27. Where a defence at law would be doubtful or difficult, equity can take jurisdiction. *Teague v. Russell & Moore*, 420
  28. Equity will not relieve for usury, where the party has failed to plead it at law, and shews no excuse for the failure. *Ibid.*
  29. Where a surety in a note under seal was discharged by the payee, by an unsealed writing, and induced for several years to believe he was released, and until the principal became insolvent, equity will relieve as for a fraud. *Ibid.*
  30. An ante-nuptial contract, by which the husband agrees that the wife shall enjoy her property to her own sole use, does not, in equity, bar the right of the husband to co-tenancy. *Rockon v. Lecatt*, 429
  31. Nor does a decree of divorce *a mensa et thoro*, *Ibid.*
  32. Nor an injunction obtained by the wife during her lifetime, prohibiting the husband from intermeddling with her property. *Ibid.*
  33. A security in an injunction bond, filed his bill for relief against a judgment rendered against him on the bond: held that he could not go into the merits of the previous decree rendered against his principal, nor of the original judgment at law which had been enjoined; no fraud being alleged in the rendition of the decree. *McBroom v. Somerville et al* 515
  34. Under some circumstances, the sickness and inability of counsel to attend court may entitle a party to relief in equity: but if there are counsel in attendance who are unprepared, a motion for a continuance or new trial at law is the proper remedy. *Ibid.*
  35. A court of equity cannot, any more than a court of law, compel a party to relinquish a security he has fairly acquired, or change it for another; therefore, equity cannot substitute a person as defendant in a judgment in place of another. *Ibid.*
  36. Where a bill is dismissed for want of prosecution, it operates as a discontinuance, and does not prevent the bringing of a new bill. *Ibid.*
  37. Where money has been paid under a contract which has been rescinded or alleged to be fraudulent, an action at law lies to recover it back; and in the absence of special allegations of failure of proof, or other matter of equitable relief, chancery has no jurisdiction. *Sadler et al. v. Robinson's heirs*. 520
  38. Chancery cannot arbitrarily annul or rescind a contract, to administer justice, but is bound by rules and precedents. *Ibid.*
  39. A party cannot claim a rescission of a contract, for fraud, after entering into new stipulations concerning it, with a full knowledge of the fraudulent circumstances. *Ibid.*
  40. And where it is not rescinded, or otherwise determined, the purchase money cannot be reclaimed. *Ibid.*
  41. Long acquiescence in a transaction, without objection, will create a presumption of a waiver of a fraud, and a recognition of an act done by another. *Ibid.*
  42. Where a firm purchased lands, and one of the partners was an infant, it was held that he could not recover back his portion of the purchase money paid to the vendor, the contract being binding as to the other part.

ners, and they having the right to control the firm funds. *Ibid.*

# CHANGE OF VENUE.

See *Indictment* 3. 4.

# CHARTER.

See *Bank*.

# CITATION.

See *Writ of Error* 4. 5.

# COMMON COUNT.

See *Pleading* 1.—3.

# COMPROMISE.

See *Chancery* 4.

" *Contract* 3.

# CONFIRMATION.

See *Chancery* 4.

# CONSPIRACY.

1. A conspiracy is punishable by fine and imprisonment, as a misdemeanor. *The State v. Carwood et al.* 360
2. A confederacy to do an unlawful act, to the injury of another, is sufficient to sustain an indictment for a conspiracy. It is not necessary that such an act be actually committed. *Ibid.*

# CONSTITUTION.

1. The act giving summary judgment in the supreme court, against securities, in writ of error bonds, is not unconstitutional. *Johnston et al. v. Atwood*, 225
2. A party may, in certain cases, by act of record, waive his constitutional right of trial by jury. *Ibid.*
3. When a statute merely gives a remedy to enforce an existing right or obligation, it may act retrospectively. *Anonymous*, 228
4. A citizen may, by accepting a beneficial public office, waive a constitutional franchise. *The State v. Adams*, 231
5. The act of 1829, giving the power to commissioners to decide who shall be entitled to pre-emption rights, without appeal, is not unconstitutional. *Bell et al. v. Payne & Williams*, 414
6. The supreme court has a general supervising power over all inferior tribunals which may be erected, but only to prevent the infringement of positive rights. *Ibid.*

# CONSTRUCTION OF STATUTE.

See *Bastardy*.

See *Bank* 1. 2.

" *Constitution* 3. 5.

" *Costs* 1. 2.

" *Discontinuance* 4.

" *Fraud* 2.

" *Ferry* 1. 2. 3.

" *Interest* 1. 2.

" *Indictment* 1.

" *Penalty* 1. 2. 3.

" *Pre-emption right*.

" *Writ*.

# CONTRACT.

1. A parol contract for the purchase of lands, is void, and payment of part of the purchase money does not take the case out of the statute of frauds. *Allen v. Dooker*, 21
- Keath v. Patton*, 38
2. A bank charter is a contract, and its terms cannot be altered by the Legislature without the consent of the bank. *The State v. The Tombeckbee Bank*. 30
3. Where a party with the full knowledge of the fraudulent circumstances, recognizes or confirms a contract made in his name by an agent, he cannot afterwards set up the fraud or want of authority in that agent. *McGowen v. Garrard & Morgan*, 479

See *Agreement*.

" *Chancery* 2. 4. 30. 37.

" *Vendor and Purchaser* 1. 2. 8. 10.

# CORPORATION.

1. A corporation created in another state may sue here. *Lucas v. The Bank of Georgia*, 147
2. And where a corporation sues, can the authority of the attorney who institutes the suit be inquired into—*quere?* *Ibid.*
3. The existence of an incorporated bank in another state may be established by a copy of its charter, and parol proof of its being in operation. *Ibid.*
4. A corporation may assign its effects to a trustee for the benefit of its creditors. *Pope v. Brandon et al.* 401
5. And the president of the corporation may be the trustee. *Ibid.*

See *Bank*.

" *Contract* 2.

# COSTS.

1. In assumpsit, a judgment by default for costs only, and no damages, is erroneous. *Pickens v. Hayden & Meriam*, 10
2. The act of 1827, authorizing executions for costs in the supreme court to issue in certain cases, applies as well to judgments rendered before as to those rendered after the passage of the act. *Anonymous*, 228

3. The costs chargeable against the successful party, by that act, include all except the appearance of the opposite party, and such acts as are done at his instance. *Ibid.*
4. An execution cannot be quashed because more costs are charged than are properly due: the error can be corrected on a motion to retax. *Ibid.*
5. The supreme court will correct clerical mistakes, made in the court below, and apparent on the face of the record; but at the costs of the plaintiff in error. *Wade v. Kelly & Hutchison*, 443
6. In trespass for assault and battery, if the verdict is for five dollars damages only, full costs cannot be given, unless the judge certifies. *Reid v. Gordon*, 469
7. It does not vary the case though the jury find costs for the plaintiff. *Ibid.*
8. Where an order has been made for security for costs, the court will presume the necessary showing to have been made, to entitle the party thereto. *Thompson v. Miller*, 470
9. But where the record shews only that a motion was made to the court for security for costs, and that the court afterwards entered the order *nunc pro tunc*, on parol evidence that the motion had been granted; it was held to be error. *Ibid.*
10. Security for costs may be required, as well in cases of appeal from justices as in other cases. *Ibid.*

#### COUNTY COURT.

*See Jurisdiction 2.*

*" Vendor and Purchaser 8.*

#### CREDITOR.

*See Debtor and Creditor.*

#### CRIMES AND MISDEMEANORS.

1. In criminal cases, and where not affected by statute, the common law of England is in force in this state, so far as it is consistent with the spirit of our institutions. *The State v. Cavood et al.* 360
  3. And though the common law punishment for a conspiracy may be inapplicable, the offence may nevertheless be punished as a misdemeanor. *Ibid.*
- See Indictment.*

#### COTTON RECEIPT.

1. Cotton receipts, by our statute, are placed on the same footing, as to negotiability with inland bills of exchange. *Winston v. Mosley*, 137
2. And when assigned by the payee before due, are not subject, in the hands of innocent

indorsees, without notice, to offset existing against the payee. *Ibid.*

#### CURTESY.

1. An ante-nuptial agreement, whereby the husband relinquishes all right to the property of the wife, and agrees that she shall retain it to her sole use, does not bar the husband's right of curtesy. *Rockon v. Lecatt*, 429
2. Nor does a decree of divorce *a mensa et thoro*, pronounced against the husband. *Ibid.*
3. Nor an injunction granted in the lifetime of the wife, at her instance, prohibiting the husband from intermeddling with her property. *Ibid.*
4. The rule of construction on such an agreement is the same in equity as at law. *Ibid.*

#### DAMAGES.

1. It is error, if the judgment to be for more damages than are laid in the declaration. *M'Whorter v. Sayre & Sayre*, 225  
*See Judgment 1.*  
*" Trover 5.*

#### DEBT.

1. In debt, on the record of a judgment in another state, *nul tiel record* is the general issue; but is not the only plea that may be pleaded. *Hunt & Condry v. Mayfield*, 124  
*Lucas v. The Bank of Darien*, 220
2. Defences for want of jurisdiction in the court where the judgment was rendered, either over the subject matter, or person of the defendant, must be specially pleaded. *Ibid.*
3. And under the plea of *nul tiel record*, if a proper exemplification is produced, of a judgment, valid in the state where rendered, though not founded on personal service, judgment must be given for the plaintiff. *Hunt & Condry v. Mayfield*, 124
4. And under that issue, the court cannot give the interest of the sister state; the rate and amount of interest must be found by a jury. *Ibid.*
5. Debt on a guardian's bond must be in the name of the judge of the county court for the use of the party injured. *Davis v. Dickson et al.* 370
6. It is however sufficient, if the declaration shews for whose use the suit is brought; it is not indispensable that it appear in the writ. *Ibid.*
7. Nor is it necessary that it appear in the declaration, in what manner he has become interested. *Ibid.*
8. The bringing the suit is sufficient evidence that the person injured required it to be brought. *Ibid.*
9. In such action, it is sufficient if the breaches

- are assigned in the replication only, and it is not error that the declaration is on the penalty merely. *Ibid.*
10. In debt on a bond given by a party charged with being the father of a bastard, the court gave judgment on demurrer, for \$500, the penalty of the bond being \$2,000: Held, that this was not error. *Lake & Barron v. The Governor*, 395
11. Such bond is not within the statute of 1824, requiring breaches to be assigned. *Ibid.*
12. A judgment in another state, on an original attachment, is *prima facie* evidence of the debt here. *Miller v. Pennington*, 399
13. In debt, where the pleadings were in short, and the issues were found for the plaintiff for damages only, omitting the mention of the debt; held that this was sufficient to sustain the judgment for the debt. *Garrison v. Zachariah*, 410
14. A constable levied nine executions on a negro, and took nine bonds payable to the plaintiff, for the delivery of the property; the bonds being forfeited, the plaintiff brought an action of debt and declared in one count on the nine bonds: on demurrer, the proceedings were held to be proper. *Sugg v. Burgess & Davis*, 509  
*See Bond 2.*  
*" Executors & Administrators 3. 7. 8.*  
*" Pleading II.—4.*  
*" Public Policy 1. 2. 3.*
- DEBTOR AND CREDITOR.**
1. A debtor has a full right to prefer some creditors to the exclusion of others, and may lawfully stipulate that those who accept the property conveyed shall release him, the contract being voluntary. *Robinson v. Rapelye & Smith*, 86
2. And the insolvency of the debtor does not vary this rule. *Ibid.*
3. A creditor will receive the aid of chancery to pursue an equitable fund, if he cannot obtain satisfaction of his debt at law. *Lucas et al. v. Atwood et al.*, 378
4. And when such fund is subjected, he will not be required to distribute among creditors generally. *Ibid.*
5. And the first who applies to chancery is entitled to a preference. *Ibid.*
6. Creditors of a copartnership are entitled to be first paid out of copartnership effects, to the exclusion of the creditors of an individual partner. *Ibid.*
7. A conveyance of lands, though not duly registered, if made *bona fide*, and for valuable and sufficient consideration, is good against creditors. *Avent v. Read*, 488
8. Such deed is good against a purchaser at sheriff's sale, who has notice. *Ibid.*
- See Chancery 4.*  
*" Fraud 2. 4.*  
*" Lex Loci 1.*  
*" Release.*  
*" Trust and Trustee 2. 3. 4. 5.*
- DECLARATION.**
- See Damages.*  
*" Debt 6. 14.*  
*" Pleading I.*
- DECREE.**
- See Chancery.*
- DEED.**
1. Inadequacy of price, to invalidate a deed, must be gross and apparent. *Pope v. Brandon et al.*, 401
2. A conveyance of lands, though not duly registered, if made *bona fide*, and for a valuable consideration, is good against creditors. *Avent v. Read*, 488
3. Such deed is also good against a purchaser at sheriff's sale, who has notice. *Ibid.*
- See Assignment 2.*  
*" Executors and Administrators 4.*  
*" Promissory Note 1.*  
*" Vendor and Purchaser 4.*
- DEED OF TRUST.**
- See Trust and Trustee.*
- DELIVERY BOND.**
- See Debt 14.*
- DEMAND.**
- See Pleading I.—2. II.—8.*
- DEMURRER TO EVIDENCE.**
1. The court must take as true, against a party demurring to evidence, all facts and inferences which a jury could properly draw; yet the same rules of evidence govern as in other cases, as to the inferences of witnesses. *Carrington v. Caller*, 175
- DEPOSITION.**
- See Evidence VIII.*
- DESCRIPTO PERSONAE.**
- See Executor and Administrator 2. 4.*



## DISCONTINUANCE.

1. If a defendant desires to take advantage of a discontinuance as to a party sued with him, he must do so in the court below, else the objection is waived. *Roberts v. Johnson*, 13
2. A writ issued against three defendants was served on two only, and the declaration and judgment were against the three: this is error, although the record recites that "the defendants, by their attorney, waived their plea." *Williams et al. v. Lewis*, 41
3. And such judgment is erroneous as to all there being no discontinuance as to the one not served with the process. *Ibid.*
4. The statute of 1814, authorizing discontinuance as to joint defendants, who are returned "not found," in certain cases, extends to actions against joint indorsers. *Martin v. Townsend*, 329
5. In an action against two on a contract, not being within the statute of 1818, a discontinuance as to one, who is returned "not found," is a discontinuance as to all. *Thompson v. Saffold et al.*, 494
6. A certificate of a purchase of a lot of land, entitling the purchaser to a title on payment of the purchase money, is not within said statute. *Ibid.*
7. And such discontinuance is good cause of demurrer. *Ibid.*

## DISCOVERY.

See *Chancery* 9, 19.

## DIVORCE.

1. A divorce *a mensa et thoro*, pronounced against the husband, does not bar his right of curtesy. *Rochon v. Lecatt*, 429

## EJECTMENT.

See *Trespass to try Titles*.

## ELECTIONS.

See *Officer* 1 to 6.

## EQUITY.

See *Chancery*.

## ERROR.

See *Costs* 1.

" *Discontinuance* 1. 3.

## EVIDENCE.

I. *Records*.

II. *Public Writings not Records*.

III. *Written Evidence*.

IV. *Parol Evidence*.

V. *Proof in Particular Issues*.

VI. *Competency of Witnesses*.

VII. *Admissibility*.

VIII. *Depositions*.

I. *Records*.

1. In debt on the recovery of judgment in a sister state, under *nul tiel record*, if a verbatim transcript is produced, of a judgment valid in the state where rendered, there not founded on personal service, judgment must be given for the plaintiff. *Hunt v. Condry v. Mayfield*, 1.
2. The existence of an incorporated bank in another state, may be proved by a copy of its charter, and parol proof of its being in operation. *Lucas v. The Bank of Georgia*, 147
3. The answer of a defendant in chancery is not evidence against his co-defendant, particularly where it tends to invalidate a title made by himself. *Collier v. Chapman et al*, 103
4. The amended return of a sheriff on an execution, is evidence to sustain the title of a purchaser, though made long afterwards. *Brandon v. Snows & Cunningham*, 255
5. An answer in chancery, which is not traversed, is to be taken as true. *Semble. Lucas v. The Bank of Darien*, 280

See *Authentication*.

II. *Public Writings not Records*.

1. The original election returns are evidence of the votes given at an election, and if altered or defaced, the alterations are matters of investigation for the jury. *The State v. Adams*, 231
2. Petitions to the governor, urging reasons for an executive appointment, are not evidence to impeach the right of an officer holding an executive appointment. *Ibid.*

III. *Written Evidence*.

1. To sustain an action of trespass to try titles a deed made to the plaintiffs, "as administrators," is admissible evidence. *Ingenerity v. Kennedy & Kitchens*, 156
2. In an action by a surviving partner, on a note made payable to the firm, the note is sufficient evidence, and it is not necessary to prove the partnership or survivorship. *Smith v. Hunt*, 222
4. So in an action, by a firm, on a note made to them as payees. *Smith v. Davis et al*, 224
4. Process, to be given in evidence under a plea of justification in trespass, must correspond strictly with the description in the plea: if variant, it will be rejected. *Harri-son v. Davis*, 350

IV. Parol Evidence.

1. The contents of lost letters may be proved by any one who knows their genuineness and contents. *Drish v. Davenport*, 266
2. Parol evidence is insufficient to support an action for the purchase money on a contract for the sale of lands. *Howard v. Jackson*, 493

V. Proof in Particular Issues.

1. On an indictment for stealing a horse, under the statute, proof that a gelding was stolen is inadmissible. *The State v. Plunket*, 11
2. Possession of personal property remaining with the vendor, is presumptive evidence of fraud. *Hobbs v. Bibb*, 54
3. But such presumption may be rebutted by proof. *Ibid.*
4. The purchaser of personal property at sheriff's sale is not bound to shew that the sheriff's proceedings were regular, it devolves on the party contesting it to shew such irregularity. *Brandon v. Snows and Cunningham*, 255
5. As to a purchaser of real estate, *Quere? Ib.*
6. Evidence of a promise of marriage is not admissible in an action by the father, for the seduction of his daughter. *Drish v. Davenport*, 266
7. The character of the daughter, for chastity, may be impeached by general reputation, but not by such as is confined to particular classes of persons. *Ibid.*
8. Affirmative allegations in an answer in chancery, not responsive to the bill, must be proved at the trial. *Lucas v. The Bank of Darien*, 280
9. Under the general issue, in trespass for taking goods from the plaintiff's possession, the defendant cannot go into evidence to shew that the sale under which the plaintiff holds is fraudulent. *Harrison v. Davis*, 350
10. A judgment on an original attachment in another state is *prima facie* evidence of the debt here. *Miller v. Pennington*, 399
11. An admission by the defendant, of the correctness of the plaintiff's demand, is sufficient evidence to recover, without proof of the original entries, or production of the account. *Johnson v. Kelly & Hutchison*, 490
12. Under the general issue in assumpsit, any evidence tending to increase or diminish the value of the article sold, is proper evidence, so as to ascertain its true value. *Munn v. Pope*, 498
13. If a party agrees to receive property in payment, it may be proven as payment under the general issue, to the extent of its value or stipulated price. *Ibid.*

VI. Competency of Witnesses.

1. In an action by an executor, a son-in-law of the testator is *prima facie* incompetent to testify. *M'Kinney's exrs. v. M'Kinney's adms.*, 17
2. A party cannot impeach the credit of his own witness, but he may prove facts, by other witnesses, which contradict his statements. *Winston v. Moseley*, 137

VII. Admissibility.

1. It is for the court to determine on the admissibility of evidence, and for the jury to determine if it proves the facts charged. *Clifton v. Grayson*, 412

VIII. Depositions.

1. Where it is agreed that a deposition shall be taken and read on trial, it is admissible, though it appear by the deposition the witness was interested. *Stebbins v. Sutton*, 249
- See Witness.

EXECUTION.

1. An execution issued against a principal and surety, and part of the money was made by the sheriff, by levy and sale of the effects of the principal, but he returned it "no money made," and an *alias* issued against the security for the whole debt: the sheriff having absconded, it was held, that in equity, the surety was entitled to relief by injunction, as to the amount made by the sale. *Fryer v. Austill*, 119
  2. An execution cannot be quashed because more costs are charged than are properly due, the error can be corrected on a motion to retax. *Anonymous*, 228
  3. A sheriff may amend his return on an execution, at any time, so as to make it true, and such return will relate back and protect a purchaser, as if originally made. *Brandon v. Snows & Cunningham*, 255
- See Sheriff 1. 5.

EXECUTIVE APPOINTMENT.

See Officer 2. 3.

EXECUTOR AND ADMINISTRATOR.

1. A purchase by an administrator, at his own sale, is not void *per se*. *Brannan et al. v. Oliver*, 47
2. A bond, payable to an administrator, as such, is assets in the hands of an administrator *de bonis non*, and the description is not

mere *descriptio persona*. *King v. Green et al.* 133

3. The intermarriage of an administratrix obligee with an obligor in a bond, does not extinguish the debt, but only suspends the cause of action during her administration and coverture. *Ibid.*
4. A deed to an administrator, as such, is admissible evidence for him, in an action of trespass to try titles. The words "as administrator" are *descriptio persona* only. *Innerarity v. Kennedy & Kitchens*, 156
5. Suing out a previous writ, is not a sufficient presentation of a claim to an administrator under the statute requiring claims to be presented. *Bigger, admx. v. Hutchings & Smith, adms.* 445
6. And if the claim originated out of the state, the exception must be replied specially to a plea of non-claim. *Ibid.*
7. By mistake in the condition of an administration bond, it was written that if M. R. [who was the deceased] should well and truly perform the duties of administrator, &c.; the mistake being apparent on the face of the instrument, it was held, that this did not vitiate, and that the bond might be declared on, with proper averments. *Moore et al. v. Chapman*, 466
8. After settlement, and a decree by the county court requiring an administrator to pay over a certain sum, a distributee may bring an action on the bond, and assign the non-payment as a breach of the condition. *Ibid.*
9. And where the settlement is final, no refunding bond is necessary. *Ibid.*

See *Vendor and Purchaser* 2. 8. 9.

" *Writ of Error* 1. 2. 3.

#### EXTINGUISHMENT.

See *Executors and Administrators* 3.

#### FALSE IMPRISONMENT.

See *Trespass* 4.

#### FEME COVERT.

See *Curtsey*.

#### FERRY.

1. The lessee of a ferry is the person liable to the penalty given by statute for neglect. *Taylor v. Rushing*, 160
2. But where a person is employed on shares for an indefinite time, he is a servant and not a lessee, and the owner is liable. *Ibid.*
3. It is unlawful to keep a public bridge, without authority and free of toll, so as to destroy the profits of a lawful ferry at the same place. *Gates v. M'Daniel & Spurlin*, 211

#### FORCIBLE ENTRY AND DETAINER.

1. In an action for a "forcible detainer," it is not necessary to allege in the complaint that the defendant "entered" the premises. *Le-catt v. Stewart*, 474
2. In such action, to charge that the plaintiff has a 'freehold in fee simple,' is a sufficient statement of his 'estate' in the premises. *Ibid.*
3. The record in those cases need only show such evidence as is offered and rejected, and such as is objected to, but admitted. *Ibid.*
4. To establish possession, the plaintiff may prove a tenancy under him, and possession by his tenant. *Ibid.*
5. In such actions, title cannot be investigated, and need not be proved. The question is as to possession only. *Ibid.*
6. The county court has no jurisdiction by *certiorari* or appeal, in cases of forcible entry and detainer. *Dunham v. Carter & Carroll*, 496
7. In cases of forcible entry brought up by *certiorari*, the trial must be on the errors assigned in the record. *Ibid.*

#### FOREIGN LAWS.

See *Chancery* 3. 15.

#### FORTH-COMING BOND.

See *Debt* 14.

#### FORFEITURE.

See *Bank* 2.

#### FRAUD.

1. A purchase by an administrator at his own sale, at auction, is not void *per se*, but is *prima facie* valid, if no unfairness appears. *Brahnman et al. v. Oliver*, 47
2. Possession of personal property remaining with the vendor, is presumptive evidence of fraud, but not fraud *per se*. *Hobbs v. Bibb*, 54  
*Martin v. White, adm'r.* 162  
*Brandon v. Snows and Cunningham*, 255
3. A plea that a judgment obtained in a sister state, was entered there by a fraudulent combination between the clerk and plaintiff, is an insufficient defence to an action at law on such record here. *Lucas v. Cope-land*, 151
4. When the vendor remains in the possession of personal property sold, it is not sufficient as against creditors, that the consideration be *bona fide*, and the bill of sale registered. It must appear that the sale was not made to hinder or delay creditors. *Ayres v. Moore*, 336
5. And this is a question of fact for the jury,

to be determined from all the circumstances. *Ibid.*

6. Inadequacy of consideration, to invalidate a deed, must be gross and apparent. *Pope v. Brandon et al.* 401
7. When a party, with a full knowledge of the alleged fraudulent circumstances, recognises or confirms a contract made in his name by an agent, he cannot afterwards set up the fraud or want of authority in the agent. *M'Gowen v. Garrard & Morgan.* 479
8. A conveyance of lands, though not duly registered, if made *bona fide*, and for valuable and sufficient consideration, is good against creditors. *Avent v. Read.* 488
9. Such deed is also good against a purchaser at sheriff's sale who has notice. *Ibid.*

*See Chancery* 12. 39. 41.  
" *Release* 3.

#### GAMING.

*See Set-off* 1.

#### GARNISHEE.

1. The answer of a garnishee in attachment is to be taken as strictly true, and if a deed is appended to the answer, it is to be considered as genuine, unless the answer is traversed. *Robinson v. Rapelye & Smith.* 86

#### GENERAL ISSUE.

*See Trespass* 3.  
" *Vendor and Purchaser* 9.

#### GRAND JURY.

*See Jury* 2.

#### GUARDIAN.

*See Debt* 5.  
" *Chancery* 10.

#### HUSBAND AND WIFE.

*See Curtesy.*

#### INDICTMENT.

1. When a statute employs a general term, and afterwards more special terms defining an offence, an indictment using the general term only, is bad, though it would in its meaning comprehend the special term. *The State v. Plunket.* 11
2. If an indictment allege a confederacy to do an unlawful act, to the injury of another, it is sufficient to constitute a conspiracy; it is not necessary that the act should be actually committed. *The State v. Carwood et al.* 360
3. To sustain an indictment where the venue

has been changed, it is not necessary that the record should shew the mode in which the jurors for the term were drawn; the venire will be presumed legal until the contrary be shewn. *Collier v. The State.* 388  
4. It is sufficient if it appear that the grand jurors were selected as the statute provides. *Ibid.*

#### INDORSEMENT ON WRIT.

*See Writ* 1.

#### INDORSER.

*See Discontinuance* 4.

#### INFANT.

*See Chancery* 10. 11. 42.

#### INJUNCTION.

*See Chancery.*  
" *Ferry* 3.  
" *Pre-emption Rights* 1.

#### INSOLVENT DEBTOR.

*See Debtor and Creditor* 1. 2. 6.

#### INTEREST.

1. Under the statute of 1819, a note bearing interest at 5 per cent per month on its face, bears such interest only till maturity, and the usual legal rate afterwards. *Ellis v. Bibb.* 63
2. And when a note given in a compromise, embraces more interest than is lawfully due, both parties believing it lawfully due and recoverable, it is not usurious. *Ibid.*
3. In debt on the record of a recovery in a sister state, the interest in such state must be found by a jury. *Hunt v. Condry & Mayfield.* 124

#### ISSUE.

*See Practice* 15.

#### JEOFAILS.

*See Amendments and Jeofails.*

#### JOINT ACTION.

*See Discontinuance* 1. 4. 5.

#### JUDGMENT.

1. A judgment by default in assumpsit for costs only, is erroneous. *Pickens v. Hayden & Meriam.* 10
2. A judgment rendered by the judge in vacation, as of the preceding term, and recorded, pursuant to a consent previously made in open court, is sufficient to sustain a writ of error. *King v. Green et al.* 133

3. A defendant is entitled to judgment where there are three issues and the jury find for him, though some of the jurors disagree as to one of the issues. *Winston v. Mosely*, 137
4. Judgment for more damages than are laid in the declaration is error. *M'Whorter v. Sayre & Sayre*, 225  
*Johnson v. Kelly & Hutchison*, 490
5. A judgment rendered in another state, when the court had no jurisdiction over the person, is not binding, and may be impeached by plea at law. *Lucas v. The Bank of Darien*, 280  
*Bigger ad'x v. Hutchings & Smith ad're* 445
6. But a judgment on an original attachment in another state, though without personal service, is prima facie evidence of the debt here. *Miller v. Pennington*, 399  
*Bigger ad'x v. Hutchings & Smith ad're* 445
7. A judgment at law will not be relieved against in equity on account of mere technical defects. *Lucas v. The Bank of Darien*, 280
8. A judgment rendered during the term does not relate back so as to defeat a bona fide purchaser or assignee. *Pope v. Brandon et al.*, 401
9. A judgment on a *sci fa.* against the obligor in an injunction bond, will not be reversed for error, though the bond when forfeited has by statute the force and effect of a judgment. *Boggs v. Bandy*, 459
10. A judgment *nunc pro tunc* must be founded on matter of record, or some memorandum of the court. *Thompson v. Miller*, 470
11. A sheriff may be allowed to amend his return, so as to shew that process was served on the defendant, to sustain a judgment, even after error brought. *Heflin v. M'Ninn*, 490
12. In assumpsit, a judgment by default final is an admission of the cause of action as laid. *M'Gehee v. Childress*, 506
13. A judgment may be presumed to be in full force, though a writ of error be sued out on it, when the record shews no disposition of the writ of error. *Gee adm'r v. Nicholson*, 512  
*See Action 9. 10. 11.*  
"Award.  
"Debt 1. 2. 3. 4.  
"Penalty 1.  
"Practice 7.  
"Pre-emption Rights.  
"Record 1.

## JUDGMENT NUNC PRO TUNC.

*See Judgment 10.*

## JUDGMENT ON MOTION.

1. Judgment may be lawfully rendered on motion in the supreme court, against securities, in writ of error bonds. *Johnson et al v. Atwood*, 225
2. And such proceeding is not an assumption of original jurisdiction by the supreme court. *Ibid*

## JURISDICTION.

1. Where more than fifty dollars is due on a contract, a creditor may relinquish all over fifty dollars, and bring suit for \$50 in a justice's court. *King v. Dougherty*, 421
2. The county court has no jurisdiction by certiorari, or appeal, in cases of forcible entry and detainer. *Dunham v. Carter & Carroll*, 496

*See Appeal from Justice of Peace 4. 8.*

"Chancery.

"Execution 1.

"Judgment 5.

"Judgment on Motion.

"Ne Exeat 1.

## JURY.

1. A party may, in certain cases, by acts of record, waive his right of trial by jury. *Johnson et al v. Atwood*, 225
2. It is sufficient if it appear in the record that the grand jurors were "selected as the statute provides." It need not be stated that they were drawn by lot. *Collier v. The State*, 388
3. The whole record and proceedings in a cause are before the jury trying the issues, and they may examine any part though not read on the trial. *Ibid*.
4. It is the province of the jury to determine if the evidence establishes the facts charged. *Clifton v. Grayson*, 412

*See Appeal from Justice 7. 8.*

"Bastardy 3.

"Interest 3.

"Verdict 1.

## JUSTICE OF THE PEACE.

*See Appeal from Justice.*

## JUSTIFICATION.

*See Trespass 1. 2. 3.*

## LAND.

*See Public Lands 1.*

"Trespass to Try Titles.

## LESSOR AND LESSEE.

*See Ferry 1. 2.*

## LEX LOCI.

1. A deed of assignment by a debtor for the benefit of his creditors, though made in New-York, will operate against a creditor

here, who has subsequently attached the effects assigned. *Robinson v. Rapelye & Smith*, 86

See Attachment 3. 4.

" Chancery 3.

" Corporation 1. 2. 3.

" Judgment 5. 6.

" Record 1.

#### LIEN.

See Judgment 8.

#### LIMITATION OF ACTIONS.

1. Suing out a previous writ is not sufficient evidence of presentation to an administrator, under the statute requiring claims to be presented to executors and administrators. *Bigger adm'r v. Hutchings & Smith adm'rs*, 445
2. If the demand originated out of the state, so as to be within the exceptions of the statute, that matter must be specially replied to a plea of non claim. *Ibid.*  
See Chancery 41.

#### MARRIAGE.

See Bond 2.

" Curtesy.

#### MISTAKE.

See Bond 6.

#### MONEY HAD AND RECEIVED.

See Assumpsit 2.

#### MOTION.

See Judgment on Motion.

#### NE EXEAT.

1. It appears that in this state, *ne exeats* may issue in the following cases:
  1. Where the demand is exclusively equitable, whether a sum certain be due or not, and the defendant is about to remove beyond the jurisdiction of the court.
  2. Where courts of law and equity have concurrent jurisdiction, the defendant being about to remove, and where bail has not been obtained, it will be granted in aid of the action at law.
  3. Where the two courts have concurrent jurisdiction, and no action at law has been commenced, but suit in equity instituted; the removal of the defendant will be restrained.
  4. In cases of extreme necessity, and where it becomes necessary to prevent a failure of justice. But as to this last, *quere?* *Lucas v. Hickman*, 111  
See Chancery 14.

#### NOTE.

See Pleading 1.—2. 7. III.—1. 3.

" Promissory Note.

#### NOTICE.

See Executor and Administrator, 5. 6.

" Partnership 4 to 8.

#### NUL TIEL RECORD.

See Debt 1. 2. 3. 4.

#### NUNCUPATIVE WILL.

See Will 3.

#### OBLIGATION.

See Bond.

" Penalty 4. 5.

" Promissory Note 1.

#### OBLIGOR AND OBLIGEE.

See Bond.

#### OFFICER.

1. Under the act of 1819, a sheriff has no right to give a casting vote between two candidates for sheriff. Such power cannot be given by implication. *The State v. Adams*, 231
2. Where two candidates for sheriff obtain an equality of votes, no election is effected; and the executive may fill the vacancy. *Ibid.*
3. Where the right of the executive to make an executive appointment exists, a court of justice cannot examine into the motive for that appointment. *Ibid.*
4. A citizen may, by accepting a beneficial public office, waive his constitutional right to vote in certain cases. *Ibid.*
5. The original election returns are evidence to prove the true number of votes given at an election. *Ibid.*
6. And if they have been in an exposed situation, or altered, the alterations are matter of inquiry for the jury. *Ibid.*
7. Between third persons, the presumption is, that a public officer has correctly done his duty. *Brandon v. Snooks & Cunningham*, 255

#### PARTNERSHIP.

1. In an action by a surviving partner, on a note made to the firm, it is not necessary to prove the partnership or survivorship: the note is sufficient evidence. *Smith v. Hunt*, 222
2. And if the plaintiff is not the person properly entitled, and the objection does not appear on the face of the proceedings, it must be shewn by way of defence. *Ibid.*
3. So in an action by copartners, who are pay-

- ees, on a note made to them. *Smith v. Davis et al.* 224
4. If no notice be given of a dissolution of a copartnership, it will be considered as still existing. *Lucas v. The Bank of Darien*, 280
  5. To those who have had previous dealings with the firm, actual notice must be given, and a notice in a gazette to those who have had no previous dealings. *Ibid.*
  6. A change of pursuits by one partner, or his removal out of the state, does not amount to such notice. *Ibid.*
  7. The rule is not varied, though the creditor be a bank established after the dissolution. *Ibid.*
  8. And to charge a bank with notice of dissolution, it is not sufficient to shew that the partner receiving the credit was one of the directors of the bank. *Ibid.*
  9. A partner may appoint an agent to make and indorse bills, &c. on the firm, and such power is not void, though made under seal by one partner only. *Ibid.*
  10. Whether such power can extend to authorise the agent to enter an appearance for the copartners, in courts of justice—*quere?* *Ibid.*
  11. Creditors of a copartnership are entitled to be first paid out of the copartnership effects, to the exclusion of the creditors of an individual partner. *Lucas et al v. Atwood et al.* 378
  12. *Semble*, that after the dissolution of a copartnership, one partner cannot by his sole request to a third person to pay a firm debt, give such person a right to maintain an action for money had and received against the firm. *Weakley v. Brahan & Atwood*, 500
  13. Where a firm purchased lands and one of the partners was an infant, he cannot recover back his portion of the purchase money paid to the vendor, the contract being binding as to the other partners, and they having the right to control the firm funds. *Sadler et al v. Robinson's heirs*, 520
- PARTY.
- See Chancery* 9. 17. 18.  
*" Debt* 5. 6. 7.  
*" Practice* 18. 19.
- PAYMENT.
1. If a party agree to receive property in payment, it may be proven as payment under the general issue, to the extent of its value or stipulated price. *Munn v. Pope*, 498  
*See pleading* II—7. 8.
- PENALTY.
1. When under a statute, a penalty has accrued to an individual, it is a vested right, and the repeal of the statute, pending a writ of error, does not divest it; and the court may go on to render judgment. *Taylor v. Rushing*, 160
  2. The lessee of a ferry is the person liable to the penalty given by statute for neglect. *Ibid.*
  3. But where a person is employed on shares for an indefinite time, he is considered as a servant, and the owner is liable. *Ibid.*
  4. In general, where an obligation is to pay a sum of money, which may be discharged by a lesser sum, it is a penalty, and the lesser sum only is recoverable with interest. *Plummer v. M'Kean & M'Kean*, 423
  5. But where the payment is to be made at a different and distant place, it is otherwise, and the larger amount may be recovered. *Ibid.*
  6. And if a note be for a sum certain, payable at a future day, which may be discharged by the payment of a lesser sum, at an earlier day, the larger sum may be recovered. *Jordan v. Lewis*, 426
- PLEA.
- See Pleading* II.
- PLEADING.
- I Declaration.  
 II Plea.  
 III Replication.  
 IV Issue.
- I. Declaration.
1. Judgment for more damages than are laid in the declaration, is error. *M'Whorter v. Sayre & Sayre*, 225
  2. Where no place of payment is designated in a note for the payment of specific articles, a demand need not be averred by the plaintiff. *Cobb v. Reed*, 444
  3. In a common count in assumpsit, the consideration of indebtedness must sufficiently appear to shew that the demand is on simple contract. *Maury v. Olive*, 472
  4. An omission to state the term of the court in the title of the declaration, is not fatal on general demurrer. *Spann v. Boyd*, 480
  5. In appeals from justices, technical nicety and formal declarations are not required. *Ibid.*
  6. Where there are good and bad counts in a declaration, on general demurrer to the whole, judgment must be given for the plaintiff. *Ibid.*
  7. The plaintiff declared in assumpsit on a note for \$1500, to be paid on the happening of a certain event, and averred that the event had happened, as appeared by an indorsement

on the note: this is sufficient to warrant a judgment by default final. *M'Gehee v. Childress*, 506

8. Suffering a judgment by default, is an admission of the cause of action as laid in the declaration. *Ibid.*
9. In one count, the plaintiff declared on nine forfeited bonds taken by a constable, payable to the plaintiff, for the delivery of a negro levied on under nine executions. On general demurrer, the proceedings were held regular. *Sugg v. Burgess & Davis*, 509

## II. Plea.

1. In debt on the record of a recovery in a sister state, *nul tiel record* is the general issue, but is not the only plea that may be pleaded. *Hunt & Condry v. Mayfield*, 124
2. In such action, a want of jurisdiction of the court where the judgment was rendered, over the subject matter, or person of the defendant, must be specially pleaded. *Ibid.*
3. And under the plea of *nul tiel record* only, if a proper transcript is produced; of a judgment, valid in the state where rendered, though not founded on personal service, judgment must be given for the plaintiff. *Ibid.*
4. To an action of debt on the record of a recovery of a judgment in a sister state, a plea alleging that the judgment was entered by a fraudulent combination between the clerk and the plaintiff, is bad. *Lucas v. Copeland*, 151
5. In trespass for taking goods, a plea of justification under process, must specify the process particularly, and every fact necessary to shew that the officer is justified. *Harrison v. Davis*, 350
6. And the process must be correctly described in the plea, without variance. *Ibid.*
7. Pleading to the merits, after a plea in abatement has been overruled, is a waiver of the plea in abatement. *Wade v. Kelly & Hutchison*, 443
8. To a note for the payment of specific articles, where no place of payment is designated, the defendant may plead in bar, that he was ready and willing to deliver the articles when due. *Cobb v. Reed*, 444  
*See Abatement.*  
    " *Partnership* 2. 3.  
    " *Practice* 6.

## III. Replication.

1. To avoid a note given for a gaming consideration, and held by the defendant as assignee, and pleaded as a set-off, the plaintiff must reply the objection specially. *Baldwin v. Brogden*, 911

2. Where a claim against an estate originated out of this state, so as to be within the exception in the statute requiring claims to be presented to an administrator or executor, such matter must be specially replied to a plea of non claim. *Bigger adm'r. v. Hutchings & Smith adm'rs.*, 445
3. To a plea that the note sued on was founded on an usurious consideration, a replication that it was not usuriously agreed that more than legal interest should be received, is bad. *Wright v. Minter*, 453

## IV. Issue.

1. Where by consent, pleadings are taken in short, no advantage can be taken for informality; after verdict, the words "replication" and "issue" will be held to apply to all the pleas filed. *Garrard v. Zachariah*, 410  
*See Abatement.*  
    " *Arrest of Judgment.*  
    " *Demurrer to Evidence.*  
    " *Discontinuance.*

## PRACTICE.

1. Where a writ is executed on two defendants, and the plaintiff discontinues as to one, and takes judgment against the other; if the objection is not made in the court below, it is not available in error. *Roberts v. Johnson*, 13
2. On a writ against two defendants, the sheriff returned "Executed; copy offered to defendant R. and not accepted." *Semble*, that this is to be considered as executed on R. only. *Ibid.*
3. After the return term, no exception can be taken for the want of an indorsement of the cause of action on a writ. *Tankersley v. Richardson*, 130
4. A judgment on an award will be supported, though there be no declaration. *Ibid.*
5. Under a consent made in open court, a judgment rendered by the judge as of the preceding term, and recorded, is sufficient to support a writ of error. *King v. Green et al.*, 133
6. Where a suit is instituted by a corporation, and profert of the authority of the attorney who institutes it, is made in the declaration, the defendant, by pleading the general issue, waives the right to inquire into his authority. *Lucas v. The Bank of Georgia*, 147
7. To two writs of error, one record was returned, containing two judgments; the record being applicable to neither, the writs should be dismissed. *Smith v. Hearne*, 169
8. Judgment for more damages than are laid in the declaration, is error. *M'Whorter v. Sayre & Sayre*, 225



9. An execution cannot be quashed because more costs are charged than are due. The error can be corrected on motion to relax. *Anonymous*, 228
  10. The court may lawfully sum up the evidence to the jury, and instruct them hypothetically. *Brandon v. Snows & Cunningham*, 255
  11. In an action against two joint indorsers, where one is not found, the plaintiff may discontinue as to him, under the statute of 1818. *Martin v. Townsend*, 329
  12. When a cause is on trial before the jury, the whole record is before them, whether read on the trial or not. *Collier v. The State*, 388
  13. There being in the record a plea, and a demurrer thereto, undisposed of, the judgment must be remanded, final judgment cannot be here rendered. *Miller v. Pennington*, 399
  14. On an appeal from a justice, no exception can be taken for the want of a seal to the warrant. *Rutledge v. Rutledge*, 400
  15. Where pleadings are taken in short, by consent, after verdict, no exception can be taken. The words "*replication*" and "*issue*," will be held to apply to all the pleas filed. *Garrard v. Zachariah*, 410
  16. It is for the judge to determine on the admissibility of evidence, and for the jury to determine if it proves the facts charged. *Clifton v. Grayson*, 412
  17. Pleading to the merits, after plea in abatement overruled, is a waiver of the plea in abatement. *Wade v. Kelly & Hutchison*, 443
  18. The clerk of the court below, cannot, after a party to a judgment is dead, issue a writ of error against the representatives of the deceased. *Sewall v. Bates' adm'rs*, 462
  19. *It seems*, that in such case, application must be made to this court for a *sci. fa.* or *certiorari* to the representatives, on proof of the death of the opposite party. *Ibid.*
  20. Where a sheriff is a party interested, the citation must be directed to the coroner. *Ibid.*
  21. A refusal to grant a new trial cannot be revised in this court. *Lecatt v. Stewart*, 474
  22. Where there are good and bad counts in a declaration, on general demurrer to the whole, judgment must be given for the plaintiff. *Spann v. Boyd*, 480
  23. In the record, there appeared a writ, and a verdict and judgment for the plaintiff; the clerk certified that at the trial, the reading of the declaration was waived, and that afterwards it could not be found; no declaration, plea nor issue appeared in the transcript: Hold that the judgment was erroneous. *Oliver v. Judge*, 483
  24. A sheriff may be permitted, even after judgment, to amend his return on a writ, *nunc pro tunc*, so as to shew that the writ was executed in fact on the defendant. *Hefflin v. M'Minn*, 492
  25. And such return *nunc pro tunc*, will be sufficient to sustain a judgment, though made after writ of error. *Ibid.*
- See Appeal from Justice of the Peace.*  
 " *Arrest of Judgment.*  
 " *Bill of Exceptions.*  
 " *Debt.*  
 " *Demurrer to Evidence.*  
 " *Discontinuance.*  
 " *Evidence VIII. Deposition.*  
 " *Forcible Entry and Detainer.*  
 " *Garnishee,*  
 " *Jury 2. 3.*  
 " *Pleading.*  
 " *Sheriff 1.*  
 " *Verdict 1.*  
 " *Witness 2. 3. 4. 5.*
- PRACTICE IN CHANCERY.**  
*See Chancery and Chancery Practice.*
- PRE-EMPTION RIGHTS.**
1. The pre-emption right granted to settlers on lands, under the act of 1829, is matter of favor and not of right; and the decision of the commissioners as to who is entitled, cannot be controlled by injunction. *Bell et al. v. Payne & Williams*, 414
  2. And the law giving power to said commissioners to decide on such claims, without appeal, is not unconstitutional. *Ibid.*
  3. But the commissioners may at any time before filing their report, alter their decision. *Ibid.*
- PRESUMPTION.**  
*See Chancery 41.*  
 " *Vendor and Purchaser 5.*
- PRINCIPAL AND AGENT.**  
*See Agent.*
- PRINCIPAL AND SURETY.**
1. Where the creditor extends to his debtor the time for payment, without the consent of the surety, the surety is discharged. *Ellis v. Bibb*, 63
  2. A surety cannot, in equity, be required to pay more than what is lawfully due by the principal; though he promised more, there is no consideration for the promise. *Ibid.*
  3. Judgment on motion may be lawfully rendered in the supreme court against securities in writ of error bonds. *Johnston et al. v. Atwood*, 225

4. A surety in an injunction bond cannot go into the merits of the decree rendered against his principal, nor of the original judgment at law which has been enjoined, no fraud being alleged in the obtaining of the decree. *M'Broom v. Somerville et al.* 515
5. Equity cannot, any more than a court of law, compel a party to relinquish a security fairly obtained, and change it for another, and therefore cannot substitute a person as defendant in a judgment in lieu of another. *Ibid.*

See *Execution* 1.

" *Release* 3.

### PROCESS.

See *Service of Process*.

### PROMISSORY NOTE.

1. A note under seal, payable to A. B. or bearer, transferred by delivery, will not enable the bearer to maintain an action on it in his own name. *Sayre v. Lucas*, 259
2. In assumpsit on a note given to an administrator for land sold by order the county court, the proceedings being in many respects informal and incomplete, it was held that the purchaser could resist payment of the note, though put in possession of the land and not evicted. *Wiley & Gayle v. White & Lesley, adm'rs.* 331
3. And that such defence was good under the general issue. *Ibid.*
4. The plaintiff declared in assumpsit on a note, to be paid on the happening of a certain event; and averred that the event had happened, as appeared by an indorsement on the note: Held, there being no plea, that this was sufficient to warrant a judgment by default final. *M'Gehee v. Childress*, 506  
See *Penalty* 4. 5. 6.  
" *Usury* 1. 3. 4.

### PUBLIC LANDS.

1. An association formed to prevent competition at the sales of public lands, and to purchase and resell at profit, is unlawful. *Carrington v. Caller*, 175  
See *Pre-emption Rights*.

### PUBLIC OFFICER.

See *Officer*.

### PUBLIC POLICY.

1. All agreements against public policy, whether in whole or in part, are void. *Carrington v. Caller*, 175

2. An association formed for the purpose of purchasing lands of the United States at public sales by preventing competition, and for reselling at profit, is void. *Ibid.*
3. And a bond given to such association for land bought of them is void. *Ibid.*

### PURCHASE MONEY.

See *Vendor and Purchaser*.

" *Statute of Frauds* 1. 2.

### PURCHASER.

See *Vendor and Purchaser*.

### QUO WARRANTO.

See *Bank* 1. 2.

" *Officer* 1 to 6.

### RECORD.

1. The record of a judgment in another state court cannot be impeached at law by plea that it was obtained by means of a fraudulent combination between a clerk and the plaintiff. *Lucas v. Copeland*, 151
2. To two writs of error, a record was returned containing two judgments: held that it was properly applicable to neither. *Smith v. Hearne*, 169  
See *Authentication* 1. 2. 3.  
" *Debt* 1. 2. 3. 4. 6.

### REGISTRY.

See *Deed* 2. 3.

" *Statute of Frauds* 3.

" *Trust and Trustee* 1.

### REPEAL OF STATUTE.

See *Penalty* 1.

### REPLEVY BOND.

See *Bond* 7. 8.

### REPLICATION.

See *Pleading* III.

### RELEASE.

1. To a sealed instrument, an unsealed release is no defence at law. *Teague v. Russell & Moore*, 420
2. Nor is it in equity, unless founded on valuable consideration. *Ibid.*
3. But where a surety to a sealed note was discharged by the payee, by an unsealed writing, and induced for several years to believe he was discharged, and until the principal became insolvent, equity will relieve as for a fraud. *Ibid.*

## RIGHT OF PROPERTY.

See *Vendor and Purchaser*.

## SALE AT AUCTION.

See *Vendor and Purchaser* 1. 2. 4. 5. 8.

## SCIRE FACIAS.

1. A judgment on a *sci. fa.* against the obligor in an injunction bond, will not be reversed for error, though the bond by statute, when forfeited, had of itself the force and effect of a judgment. *Boggs v. Bandy*, 459
2. It seems, that the proper mode to bring up a record when a party below has died after judgment, is by application to this court for a *sci. fa.* or *certiorari*, on proof of the death. *Sewall v. Bates' adm'rs.* 462

## SECURITY FOR COSTS.

See *Appeal from Justice of Peace* 3.

## SEDUCTION.

1. In an action for the seduction of the plaintiff's daughter, evidence of a promise of marriage is inadmissible. *Drish v. Davenport*, 266
2. The character of the daughter for chastity, may be impeached by general reputation, but not by such as is confined to particular classes of persons. *Ibid.*

## SERVICE OF PROCESS.

1. A writ was issued against three defendants, was served on two, and there was a declaration and judgment against three, the record reciting that "the defendants by their attorney waived their plea;" held that this was the appearance of those only who were served with process. *Williams et al. v. Lewis*, 41
2. A sheriff may be permitted, even after judgment, to amend his return on a writ *nunc pro tunc*, so as to shew that the writ was executed in fact on the defendant. *Hefflin v. M'Minn*, 492
3. And such return *nunc pro tunc*, will be sufficient to sustain a judgment, though made after a writ of error. *Ibid.*

See *Practice* 2.

" *Sheriff* 1.

## SET-OFF.

1. Where a note held by the defendant as assignee, is produced as a set-off, if the plaintiff wishes to avoid such a note as being given for a gaming consideration, he must reply such objection specially. *Baldwin v. Brogden*, 9
2. Where a suit is brought by A. against B.,

for the use of C., a demand due by A. to B. is a good set-off. See *adm'r. v. Nicholson*, 512

3. A demand accruing by reason of a failure in part of the consideration of a note, previously transferred by A. to B., and ascertained by a decree in equity, is a good set-off. *Ibid.*

See *Cotton Receipt* 1. 2.

## SHERIFF.

1. The statute making sheriffs liable for failing to return executions three days before court, admits of a reasonable excuse for such failure. *Roberts & Battle v. Henry*, 42
2. Where two candidates for sheriff obtain an equal number of votes, no election is effected, the statute of 1819 giving the sheriff no casting vote in such cases. *The State v. Adams*, 231
3. In such cases, a vacancy occurs, which may be filled by executive appointment. *Ibid.*
4. A sheriff may amend his return on an execution at any time, to make it true, and such return will relate back and protect a purchaser as if originally made. *Brandon v. Snows & Cunningham*, 255
5. A purchaser at sheriff's sale need not prove that the sheriff duly advertised the sale, the presumption is that the sheriff did his duty. *Ibid.*
4. A sheriff may be permitted, even after judgment, to amend his return on a writ, *nunc pro tunc*, so as to shew that the writ was in fact served on the defendant. *Hefflin v. M'Minn*, 492

See *Execution* 1.

" *Practice* 2.

" *Writ of Error* 4. 5.

## SHERIFFS RETURN.

See *Execution* 1.

" *Practice* 2.

" *Sheriff* 1. 6.

## SPECIFIC ARTICLES.

See *Appeal from Justice* 4.

" *Pleading* I.—2.

## STATUTE.

See *Constitution* 3.

" *Penalty* 1.

## STATUTE OF FRAUDS.

1. A parol purchase of land is void by the statute of frauds, and money paid on such contract may be recovered back in assumpsit. *Allen v. Booker*, 21
- Keath v. Patton*, 38

2. And payment of part of the purchase money, does not take the case out of the statute. *Ibid.*
3. Where the vendor remains in possession of personal property sold, it is not sufficient, as against creditors, that the consideration be bona fide, and the bill of sale recorded. It must appear that the sale was not made to hinder or delay creditors; and this is to be determined by the jury from all the circumstances. *Ayres v. Moore*, 336

See Evidence IV.—2.

" Vendor and Purchaser 4.

#### STATUTE OF LIMITATIONS.

See Limitation of Actions.

#### STIPULATED DAMAGES.

See Penalty 4. 5. 6.

#### SUFFRAGE.

See Officer.

#### SUPREME COURT.

See Chancery 26.

" Constitution 1. 6.

#### SURETY.

See Principal and Surety.

#### SURVIVING PARTNER.

See Partnership 1. 2.

#### TENANT IN COMMON.

1. A tenant in common cannot maintain trespass to try titles against his co-tenant, without proving an actual ouster. *Foster v. Foster*, 356
2. Three persons entered into articles of agreement concerning lands to be held between them, one only being in possession, who died, leaving his widow and devisee in possession; after his death, a patent issued for the land to the three, as tenants in common: The widow is not a tenant in common with the survivors. *Ibid.*

#### TESTAMENT.

See Will.

#### TIME.

See Chancery 41.

#### TITLE TO LANDS.

See Deed 2. 3.

" Promissory Note 2.

" Trespass to Try Titles.

" Vendor and Purchaser 6.

#### TOWN.

1. As to what constitutes a town, within the

meaning of the statute concerning ferries—*quare? Gates v. M'Daniel & Spurlin*, 211

#### TRESPASS.

1. In trespass, a plea of justification under process must specify the process particularly, and state every fact necessary to shew the justification. *Harrison v. Davis*, 350
2. And the process must be correctly described; if there be a variance, it cannot be given in evidence. *Ibid.*
3. Under the general issue, in trespass for taking goods from the plaintiff's possession, the defendant cannot go into evidence to shew that the sale under which the plaintiff holds is fraudulent. *Ibid.*
4. A party who procures an illegal arrest to be made, is liable in trespass for false imprisonment, though not present aiding and abetting. *Clifton v. Grayson*, 412

#### TRESPASS TO TRY TITLES.

1. In trespass to try titles, a defendant may shew that a person has a better title than the plaintiff, and it will be a sufficient defence. *Hallett v. Eslava et al.* 115
2. Previous possession of lands is sufficient evidence of title to authorize a recovery, but only where there is no adverse documentary title. *Ibid.*
3. A certificate of confirmation of title to lots in Mobile, issued by the Register and Receiver of the land office, under the acts of Congress, is evidence of a good title in the grantee. *Ibid.*
4. And such certificate of title, accompanied with possession, will overreach a title evidenced by a previous possession merely, though it be of fifteen years standing. *Ibid.*
5. A deed made to the plaintiff, "as administrator," is admissible evidence to sustain an action of trespass to try titles. *Innerarity v. Kennedy & Kitchens*, 156
6. One tenant in common cannot maintain trespass to try titles against his co-tenant, without proving an actual ouster. *Foster v. Foster*, 356
7. In trespass to try titles against two, though the plea be joint, the jury may find against one, and not guilty as to the other. *Ibid.*
8. Where a purchaser of land receives from the vendor a covenant for possession, and for a deed of release and quit claim of all the vendor's interest, and such deed is tendered, a plea that the vendor had, and still has no title to the premises, contains no defence against an action for the purchase money, no fraud being alleged. *Garrow v. Hallett*, 449

## TRIAL BY JURY.

See *Jury* 1.

## TROVER.

1. *Semble*, that trover lies to recover back the value of property paid under a parol contract for the sale of land. *Keath v. Patton*, 38
2. To maintain trover, the plaintiff must prove property in himself, a conversion by the defendant, a right to the possession at the time of the conversion, and that the chattel was of some value. *Ibid.*, 40
3. Though a party be enjoined from removing property out of the state, yet he may maintain trover against his adversary for its conversion. *McGowen and wife v. Young*, 276
4. If the plaintiff has not the entire interest in the property sued for, the defendant may shew it in mitigation of damages. *Ibid.*

## TRUST AND TRUSTEE.

1. A. purchased at sheriff's sale, without notice, a slave which had been previously conveyed by deed, in trust. The deed had not been recorded in the manner required by the statute of fraud. But, after the sheriff's sale, and before the expiration of twelve months from the date of the deed, the trustee sold the property and executed the trust. It was held—
  1. That the necessity of registry in such case is dispensed with.
  2. That the adverse possession of A., under his purchase, made no difference, and did not prevent the trustee from executing his trust. *Echols v. Derrick*, 144
2. A corporation may assign its effects to a trustee, for the benefit of its creditors. *Pope v. Brandon et al.*, 401
3. And such assignment will be good against a judgment creditor, though the charter provides that the stockholders shall be personally responsible for the debts of the corporation. *Ibid.*
4. The absence of the signatures of the creditors does not invalidate the deed, it being of all effects, and for the benefit of all creditors unconditionally. *Ibid.*
5. Nor is the deed void because the trustee is president of the corporation, and executes the deed as such. *Ibid.*
6. The acts or omission of a trustee cannot defeat the rights of the dissenting creditors in the deed of trust, unless they contribute to the wrongful act. *Ibid.*

## USURY.

1. Where a note is given on a compromise, embracing more interest than is lawfully

due, both parties believing it lawfully due and recoverable, it is no usury. *Ellis v. Bibb*, 63

2. A party cannot be relieved in equity on account of usury, where he has omitted to plead it at law, and shews no excuse for such failure. *Teague v. Russell & Moore*, 420
3. A note for a sum certain, payable at a future day, which may be discharged by the payment of a lesser sum, at an earlier day, is not usurious on its face, but is valid. *Jordan v. Lewis*, 426
4. To a plea that the note sued on "was founded on an usurious consideration," a replication that "it was not usuriously agreed that more than legal interest should be received," is bad. *Wright v. Minter*, 453
5. A. brought suit on a note for the use of B.; under the statute, C. the defendant, offered to prove by his own oath that the note was made and given to A. for an usurious consideration, and that it was made by the advice of B., and with his knowledge, to evade the usury laws. B. denied on oath any usury, so far as he was concerned, or knowledge of the usury. It was held that this was not a sufficient denial of the usury to prevent C. from testifying. *Watkins v. Watkins use, &c.*, 485

See *Interest* 1. 2.

## VARIANCE.

See *Trespass* 2.

## VENDOR AND PURCHASER.

1. A purchase by an administrator at his own sale by auction, is not fraudulent *per se*; but is *prima facie* valid, if no unfairness appears. *Brannan et al. v. Oliver*, 47
2. Nor will such a sale, made in South Carolina be held void, though made without an order of court; the laws of South Carolina not being produced to shew that such order is necessary. *Ibid.*
3. Possession of personal property remaining with the vendor is presumptive evidence of fraud, but is not fraud *per se*. *Hobbs v. Bibb*, 54  
*Martin v. White, adm'r.*, 162
4. A. purchased at sheriff's sale, without notice, a slave which had been previously conveyed by deed, in trust. The deed had not been recorded in the manner required by the statute of frauds. But, after the sheriff's sale, and before the expiration of twelve months from the date of the deed, the trustee sold the property and executed the trust. It was held—
  1. That the necessity of registry in such

case is dispensed with, the term of twelve months allowed for registry not having expired.

2. That the adverse possession of A. under his purchase, made no difference, and did not prevent the trustee from executing his trust. *Echols v. Derrick*, 144
5. A purchaser of personal property at sheriff's sale, need not prove that the sale was duly advertised; the presumption is that the officer did his duty. *Brandon v. Snows & Cunningham*, 255
6. As to real estate—*quere?* *Ibid.*
7. A sheriff may amend his return on an execution at any time to make it true, and such a return will relate back and protect a purchaser, as if originally made. *Ibid.*
8. Where land of an intestate was sold by order of the county court, and the proceedings were irregular and incomplete in many respects, it was held that the purchaser could defend at law against the purchase money, though put in possession, and not evicted. *Wiley & Gayle v. White & Lesley adm'rs* 331
9. And such defence is good under the general issue. *Ibid.*
10. It is not sufficient, as against creditors, that a bill of sale of personal property is made on consideration *bona fide*, and that it is registered, where the possession remains with the vendor; it must appear that it is not made to hinder or delay creditors. *Ayres v. Moore*, 336
11. A judgment rendered during the term does not relate back to the first day of the term, so as to defeat a bona fide purchaser or assignee. *Pope v. Brandon et al.* 401

*See Evidence IV.—2. V.—12. 13.*  
*" Fraud 2.*  
*" Public Policy.*  
*" Statute of Frauds 1. 2.*  
*" Trespass to Try Titles.*

#### VENUE.

*See Change of Venue.*

#### VERDICT.

1. There being three issues, and a verdict for the defendant, some of the jury disagreeing as to one issue, the verdict is nevertheless sufficient for the defendant. *Winston v. Moseley*, 137

#### VOLUNTARY SETTLEMENT.

*See Chancery 12.*

#### VOTE.

*See Officer.*

#### WAIVER.

1. Filing the general issue to a declaration by an incorporation, where proferit is made of the authority of the attorney who institutes the suit, is a waiver of the right to inquire into his authority. *Lucas v. The Bank of Georgia*, 147
  2. Pleading to the merits after plea in abatement overruled, is a waiver of the plea in abatement. *Davis v. Dickson et al.* 370  
*Wade v. Kelly & Hutchinson*, 443
- See Appeal from Justice of Peace 1. 6.*  
*" Arrest of Judgment 1. 2.*  
*" Chancery 42.*  
*" Constitution 4.*  
*" Discontinuance 1.*

#### WARRANT.

*See Appeal from Justice of Peace. 1.*

#### WIFE.

*See Courtesy.*

#### WILL.

1. In construing wills, the intention of the testator must govern, and when doubtful it is to be ascertained from a full view of the entire instrument; all its parts are to be reconciled if possible; and if not, the latter provisions must govern. *Moore ex'r. v. Dudley & wife*, 170
2. B. bequeathed to his daughters, S. and A., each eight negroes, which they then possessed; and to his other daughters, each a lot of negroes equal in value to those given to S. and A., to be allotted to them when they respectively married or came of age. Held, that the valuation was to be according to age, number, comeliness, &c. of the negroes, and not to the fluctuating or casual money value, at the time the younger daughters should become entitled. *Ibid.*
3. To constitute a nuncupative will, the words spoken must have legal certainty, and be intended as a will. *Sykes et al. v. Sykes et al.* 364
4. And they must be spoken in extremis. *Ibid*

#### WITNESS.

1. In an action by an executor, a son in law of the testator is *prima facie* an incompetent witness. *McKinneys ex'r. v. McKinneys adm'rs.* 17
2. A party cannot ask his own witness questions tending to shew him incompetent or unworthy of credit. *Winston v. Moseley*, 137
3. Nor can he examine other witnesses to prove him incompetent or impeach his credit. *Ibid*

4. But he may prove facts in the cause contradicting what a previous one has deposed. *Ibid.*
5. Where it is agreed that a deposition shall be taken and read, it may be read, though it appears by the deposition the witness is interested. *Stebbins v. Sutton*, 249
5. To impeach the credit of a witness, general reputation is admissible, but not such as is confined to a particular class of persons. *Drish v. Davenport*, 266

See *Demurrer to Evidence* 1.  
 " *Usury* 5.

## WRIT.

1. After the return term of a writ, no exception can be taken for the want of an indorsement of the cause of action. *Tankersley v. Richardson*, 130

See *Discontinuance* 2. 3.  
 " *Practice* 2.

## WRIT OF ERROR.

1. A writ of error cannot be issued by a clerk below, to reverse a judgment against a party who is dead; nor can he make his administrators a party on production of letters. *Sewall v. Bates' adm'rs.* 462
2. And where the clerk has made an administrator a party, the writ of error will be quashed. *Ibid.*
3. *Semble*, that in such cases, the proper mode is to apply to this court for a *sci. fa.* or *certiorari*, on suggestion and proof of the death. *Ibid.*
4. Where the sheriff is a party in interest, the citation must be directed to the coroner. *Ibid.*
5. A citation placed in the sheriff's hands against himself and another, and returned by him as to his co-defendant "*not found*," is not legal notice to him of the citation. *Ibid.*

See *Judgment on Motion* 1.  
 " *Penalty* 1.  
 " *Practice* 5. 7.

END OF VOL. II.

*Ex. J. M.*

2554-10

37-2







HARVARD LAW LIBRARY

